

ALBERTA LAW REFORM INSTITUTE

Edmonton, Alberta

ANNUAL REPORT

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THE ALBERTA LAW REFORM INSTITUTE

History

In 1968, the Attorney General of Alberta, the Governors of the University of Alberta, and the Law Society of Alberta established the Institute of Law Research and Reform for a period of five years. They did so by an agreement dated November 15, 1967. They have continued the Institute by successive quinquennial renewals of the agreement, the last of which was entered into on March 31, 1988. By unanimous agreement, the new name "Alberta Law Reform Institute" was adopted, effective April 27, 1989.

The Institute's governing body is its Board. The three founding bodies appoint members to that Board. Those members co-opt additional members to the Board. Together with the Governors of the University of Alberta, such members appoint the Institute's Director, who serves as its chief executive officer. The Faculties of Law of the University of Calgary and the University of Alberta each appoints one Board member.

Funding

Funding for the Institute comes from three sources. The University of Alberta provides the Institute with office premises and many additional services. It also makes a fixed annual grant to the Institute. The second source is the Department of the Attorney General, which provides approximately 40% of the balance of the Institute's agreed budget. The third and largest source of funding is the Alberta Law Foundation, which provides approximately 60% of the balance of the Institute's agreed funding.

The Alberta Law Foundation is established by the Legal Profession Act and receives interest on lawyers' mixed trust accounts. One of the statutory purposes to which the money is put is conducting research into and recommending reform of the law and the administration of justice. The Law Foundation grants are made to the Institute for those purposes. The Foundation began to make grants to the Institute on a project basis in 1973, and since 1977 it has made grants towards the Institute's core funding. In the last three years, the Foundation has also made further grants to the Institute for specially designated projects or has provided further funding under the special projects initiative which the Foundation has carried out each year.

Objectives

Clause 2 of the Founding Agreement of the Institute lists the objectives of the Institute as:

- (a) to conduct and direct research into law and the administration of justice;
- (b) to consider matters of law reform with a view to proposing to the appropriate authority the means by which the law may be made more useful and effective;
- (c) to promote law research and reform;
- (d) for the purposes described in subclauses (a) to (c) to work in co-operation with the Faculty of Law of the University of Alberta, the Faculty of Law of the University of Calgary, and with others.

PERSONNEL OF THE INSTITUTE

Board of Directors

The governing body of the Institute is a Board, consisting of certain defined members, being representative of the founding parties, and the Director representing the Institute. These defined members appoint not less than four and no more than seven other members at large.

There have been three changes in Board membership during the year under review. Mr. Clark Dalton, the Director of Legal Research and Analysis for the Department of the Attorney General, returned from his study leave at the University of Ottawa, and resumed his duties as a Board member. Ms. Myra Bielby resigned from her position on the Board after being elected as a Bencher of the Law Society of Alberta, in order to concentrate on the latter duties. It is also appropriate to note that subsequently Ms. Bielby was appointed to the Court of Queen's Bench of Alberta and it is in order to extend congratulations and best wishes on that appointment to Madam Justice Bielby. The third change was the resignation of Professor Eugene E. Dais as the representative of the Faculty of Law at the University of Calgary. There was one other change in status, although no change in personnel on the Board. Professor David Jones, the nominee of the Faculty of Law at the University of Alberta, resigned from the Faculty to pursue full-time practice with the firm of de Villars Jones, but agreed to continue serving on the Board and to assume the balance of the term of Ms. Bielby. Subsequently, Professor Chris Levy was appointed as the Faculty of Law nominee from the University of Calgary and Professor Fred Laux assumed the position of nominee from the Faculty of Law at the University of Alberta.

Both Professors Levy and Laux have served previously on the Board of the Institute. The Institute welcomes them back and looks forward to continued beneficial association.

The Institute is extremely grateful for the contributions of Board members, in terms of time, energy and expertise. This printed record of gratitude and recognition is merely a token of the benefit which Board members have provided to the Institute, by way of individual, committee and full Board participation.

The membership of the Board at March 31st 1991 was as follows:

Professor Eugene E. Dais
Nominee of the Faculty of Law,
University of Calgary

J.L. Foster, Q.C.
Senior partner at the firm of Foster
Sisson & Warren, Red Deer

Alan D. Hunter, Q.C.
Chairman
Senior Partner in the firm of Code
Hunter
Appointed by the Law Society of
Alberta

H.J.L. Irwin
Partner in the firm of Corbett &
Company.

Professor Peter J.M. Lown
Director
Professor of Law, University of
Alberta. Appointed Director April 1,
1988 for a term of five years

Madam Justice B.L. Rawlins
Justice of the Court of Queen's
Bench, Calgary

C.G. Watkins
Charles Gaylord Watkins Professional
Corporation

C.W. Dalton
Director
Legal Research & Analysis
Department of the Attorney General
Nominee of the Attorney General

Adelle Fruman
Partner in the firm of Atkinson
McMahon

W.H. Hurlburt, Q.C.
Nominee of the Attorney General of
Alberta.

David P. Jones, Q.C.
Senior partner in the firm of de
Villars Jones

Dr. J.P. Meekison
Vice-President (Academic)
University of Alberta
Nominee of the University of Alberta

A.C.L. Sims, Q.C.
Chairman, Alberta Labour Relations
Board

The following persons served a portion of the year as Board members:

M.B. Bielby, Q.C.
Partner with the firm of Field & Field

Harris Wineberg
Acting Director, Legal Research and
Analysis
Department of the Attorney General
Nominee of the Attorney General

The Board meets monthly, generally on the last Thursday of each month, and has a full agenda. During the year in question, the Board met for 11 full days, once in Red Deer, once in Calgary, and the balance in Edmonton. The Board reviewed 31 agenda items and 37 administrative items, in the course of which it reviewed approximately 1,800 pages of written material. In addition, the Board met in a retreat for general planning purposes in early March of 1991 for a thorough review of Board operating procedures, presentation of materials and a long-term review of agenda topics.

The Board reviews the overall operations of the Institute by way of standing reports from the Director, as well as approving all reports and the direction of research projects.

The Board has several standing and other committees. The Management and Personnel Committee is comprised of the Chairperson, Director and two other Board members to assist the Director and the Board in the following respects:

1. To consider the Institute's proposed budget, after same has been prepared by the Director, and with a view to advising the Board.
2. Within the salary policies approved by the Board, to approve proposed salaries of the Director and Counsel.
3. To assist the Director on any management or personnel matters arising within the Institute.
4. To perform any other functions delegated to it from time to time by the Board.

The Remuneration Committee consists of the Director and the designates of the President of the University of Alberta, the President of the Law Society and the Attorney General. This committee, from time to time, reviews the needs,

resources and capabilities of the Board and shall prescribe, as may from time to time be appropriate, the salary or other remuneration or compensation to be provided to any member of the Board. During this year, this Committee met twice to approve an amended policy with respect to remuneration of Board members.

The Project Selection Committee currently chaired by Mr. Lyndon Irwin, consists of the Director, one other Board member, the Chairman of the committee and a representative of the counsel staff. Currently the personnel of the committee is: Mr. Irwin, Mr. Watkins and Ms. Shone. This committee has two roles, first to monitor the areas suggested for or in need of reform, and second to review the assignment of project topics.

Most members sit on several committees as well as on the full Board. These committees may be the standing committees of the Board which have been described above, or specific project management committees which are appointed for each project. In addition, ad hoc committees are created from time to time. The workload is a heavy one and the preparation for monthly meetings is significant. Members provide a critical service to the Institute involving time and effort far beyond mere volunteer effort. The work of members, both on the Board and on subcommittees, is an important monitor of and contribution to the quality of Institute work. The Institute is grateful to its members for the commitment which they make and for the contribution which is made to the overall work of the Institute.

Counsel

The Institute has a full time in house staff of six counsel. In addition, the Institute retains a consultant for a specified amount of time per year. Special counsel are retained for their expertise in specified subject or project areas. The Institute also has an arrangement with the Faculty of Law at the University of Alberta so that a Faculty member may be seconded to the Institute for a period of one or two years.

Change is inevitable even in a relatively small organization such as the Institute. During the year Brian Burrows returned to full-time practice with his former firm of McLennan Ross. Brian had been a vital and integral part of our Counsel staff, not only for his legal and research ability, but also for his personal

influence as a valued colleague. He had also developed into one of our resident computer experts and his contribution in each of these areas will be missed.

The search process for a new Counsel was made less easy by the quality of the candidates who applied. The short list was an impressive one and we were happy in September to welcome to the Institute Mr. Eric Spink in the position of Counsel. Eric had previously been the Director of Enforcement for the Alberta Securities Commission, prior to which he had practised in Edmonton and carried on a varied litigation and general practice. Eric's litigation and practice experience have already proved beneficial to the Institute and we look forward to him making himself quite at home among the Counsel staff.

The legal personnel at the Institute are:

Peter J.M. Lown

LL.B. (Honors) Glasgow (1968)

LL.M. Saskatchewan (1973)

Professor of Law, University of Alberta, 1969 to date.

Joined the Institute as Special Counsel in 1987 and appointed Director, April 1st, 1988.

Richard H. Bowes

LL.B. (Toronto) 1981

LL.M. (London) 1982

Joined the staff in 1986 after practising in Edmonton with the firm of Field & Field.

Responsible for projects on the Bulk Sales Act, Creditors Remedies and Cost of Credit Disclosure.

Janice Henderson-Lypkie

LL.B. (Alberta) 1981

Joined the Institute in 1988 after practice in Edmonton with the firm Emery Jamieson.

Responsible for projects on Section 16 of the Matrimonial Property Act, Mortgages Remedies and Fatal Accidents Act.

Margaret Shone

LL.B. (Toronto) 1969

LL.M. (Alberta) 1976

Joined the Institute in 1970 after completion of her Masters degree.

The most senior of Institute counsel. Responsible for projects on Limitations, Status of Children and Dispute Resolution.

Brian R. Burrows

LL.B. (Alberta) 1974

LL.M. (London) 1977

Joined the staff in 1987 after extensive practice in Edmonton with the firm of McLennan Ross.

Responsible for a project on Creditors Remedies (until May 1990).

Christina Gauk

LL.B. (Alberta) 1974

Ph.D. (Cambridge) 1990

Joined the Institute in 1988 after private consulting work in Edmonton and doctoral studies at Cambridge.

Responsible for projects on Administrative Procedures, Section 14 of the Interpretation Act and Canada Pension Plan Benefits.

Eric T. Spink
 LL.B. (Alberta) 1978
 Joined the Institute in 1990 after holding the position of Director of Enforcement with the Alberta Securities Commission.
 Responsible for projects on Canadian Depository for Securities and Dispute Resolution.

W.H. Hurlburt, Q.C.
 LL.B. (Alberta) 1949
 Counsel to the firm of Reynolds, Mirth, Richards & Farmer
 Former Director of the Institute (1975 to 1986)
 Special Consultant to the Institute since 1986.
 Responsible for projects on Land Titles and Public Inquiries.

Special Counsel

Professor Gerald B. Robertson
 Professor of Law
 University of Alberta
 Special responsibility for projects on Enduring Powers of Attorney and Decision Making Models.

Professor John M. Law
 Associate Professor
 University of Alberta
 Faculty seconded 1989-1990 with special responsibility for a project on Crown Liability.

Anne de Villars
 Partner, de Villars Jones
 Special responsibility for projects on Surrogate Rules Review and Administration of Estates.

Professor Julien D. Payne
 Professor of Law
 University of Ottawa
 Special responsibility for revision to provincial family legislation.

Professor J.C. Robb
 Professor of Law
 University of Alberta
 Faculty seconded 1990 for a project on evidence of children and other vulnerable witnesses.

Librarian

Tanya Filanovsky
 MLS (Alberta)
 Ph.D. (Leningrad, USSR)

Support Staff

The work of the Institute is ably assisted by a small but dedicated support staff. That the volume of work can be handled by such a small staff is a tribute both to their ability and to their functioning as part of an efficient and responsive

group. The Institute had approximately 18 active projects underway during the year. The management and production of Board materials, finished reports and distribution of reports is a significant responsibility for a small staff.

Carole Worock
Administrator

Shirley Ewmett
Secretary to the Director

Cheryl Robison
Word Processing

Marlene Welton
Library Assistant

Summer Students

Each year the Institute employs several students to assist in research work. Not only is this of benefit to the students themselves but greatly assists in the research work load of the Institute. We are fortunate to obtain top calibre students, who often bring special skills and experience to their work. They always bring an injection of enthusiasm which is encouraging and refreshing. This year was no exception.

During the summer of 1990 the student researchers were:

Wendy Danson
David Schwartz
Helena Sullivan
Terry Williams

WORKING METHODOLOGY

The initial impetus for a law reform project undertaken by the Institute can come from one of several sources. First, the Institute has undertaken much of its work at the suggestion of the Attorney General and other government departments. Statutes such as the Matrimonial Property Act and the Alberta Business Corporations Act were evolved with the overt encouragement of government. It is essential that a law reform agency be truly "independent" and the Institute's Board makes its own decision as to whether the Institute can and should take on a project. On some occasions projects suggested by government departments have not been taken on for one reason or another. On the whole, however, there has been a solid level of cooperation at an informal level between government departments and the Institute.

A second source of suggestions for law reform projects is the legal profession. Members of the Bar or members of the judiciary regularly make suggestions as to matters which ought to be addressed. The formal bodies connected with the Bar -- the Law Society and the Canadian Bar Association -- also raise suggestions with the Institute.

The Institute endeavours to maintain regular contact with members of the Legislature by sending copies of Reports and Annual Reports to all members of the Legislature and the Cabinet. From time to time suggestions are received from all political parties.

It is open to any person, through the office of the Director, to suggest topics for law reform projects in the province, and from time to time, though less frequently, suggestions are received.

The Institute maintains standing files on all suggestions received for law reform projects. The Project Selection Committee regularly reviews these suggestions and periodically canvasses the community for suggested topics. It also conducts planning reviews of these suggestions as projects are completed and opportunities to take on new law reform work present themselves.

Newsletters and other communications stress the need for members of the profession and the public to keep the Institute informed of problem areas or those which require review. On an internal basis, the committee assigns the

preparation of a feasibility study, designed to indicate the nature of the issues, the methodology involved, and the potential for change. That feasibility study is followed by a budget review of the implications of undertaking the project.

The committee then recommends to the Board whether to accept and to undertake the project. If the recommendation is positive, the project description and associated material form the basis for managing the project through to completion.

The aim of the Project Selection Committee, in addition to ensuring that individual projects are viable and needed, is to create a balanced workload for the Institute as a whole. It does this by ensuring that projects are both topical and do not tend to concentrate in a particular area. Of course, Institute counsel may have a particular expertise which it is best to employ, and there is a possibility that work in one area will suggest several related projects.

It follows that the Institute has not ever had a distinct "programmatic" approach to the selection of law reform projects. It has tended to be pragmatic and to select projects which are thought to raise contemporary and compelling concerns of a relatively discrete nature and where it is thought that the application of the Institute's resources will result in something workable, which will likely gain the acceptance of the Legislature. Inevitably, however, selection of projects has tended to reflect the concerns of the particular period. For instance at one point the Institute was heavily involved in an overhaul of family law in the province; subsequently a number of the commercial law statutes were considered. More recently a sense of concern with respect to the administration of justice, delays in the courts, costs and access has begun to emerge. In short, the Institute in project selection tends to be a mirror of concerns being felt in the real world.

The Board appoints a project subcommittee for each approved project. Usually this committee consists of the Director, the counsel in charge of the project, at least one Board member, and such other persons as may be of significant benefit to the project. The use of such committees provides a sounding board to the counsel, some continuity of management of the project, and an opportunity to fine tune materials before submission to the full Board. This process also allows the Board to operate more efficiently when presented with recommendations from a subcommittee. Over the first year of comprehensive operation of such committees, care was taken to ensure that

advance preparation does not deprive the Board of the opportunity for full discussion and deliberation. It appears that the appropriate balance between committee and Board has been struck, and that project committees are now seen as an integral part of the overall process of preparation of materials for the Board. These committees bridge the gap between initially setting of general policy direction and the development and application of that policy to the area under review.

The Institute is very much aware of the importance of cooperative law reform ventures, particularly in an age of tight resources. To that end, it cooperates with other law reform agencies in Canada, and the Uniform Law Conference of Canada in various forms of joint projects. The Institute is interested in advancing further the cause of cooperation in law reform ventures in Canada. There is a standing invitation to any law reform agency to propose cooperation with respect to a particular venture.

Several projects have been carried on in cooperative fashion during the year in question. First the publication of a joint committee report on Renovating the Land Titles System was the culmination of the Institute's leadership efforts in bringing representatives together from all across the country. The Institute's role in providing the principal research drafting and coordinating responsibilities was a significant one. In addition, the Institute carried on a special project in cooperation with the Surrogate Rules Committee to propose radical revisions to the Surrogate Court Rules. Finally, in cooperation with the Canadian Research Institute for Law and the Family, located at the Faculty of Law at the University of Calgary, the Institute has proposed and is carrying on a empirical study on the questions of custody and access in Alberta.

Two particular events of a cooperative nature should be mentioned. The first is the role of the Institute in incorporating the Federation of Law Reform Agencies of Canada. In addition, the Director of the Institute is one of the first Directors of this organization, along with Mr. Arthur Close, Q.C., the Chairman of the British Columbia Law Reform Commission, and Professor Clifford Edwards, Q.C., the Chairman of the Manitoba Law Reform Commission. The Institute's offices represent the head office of the Federation.

The objects of the Corporation are:

- (i) to advance law reform in Canada;
- (ii) to encourage the growth cooperation between law reform agencies;
- (iii) to educate the public on the role of law reform agencies;
- (iv) to discuss and promote issues of interest and concern to law reform agencies;
- (v) to provide a forum for meetings of persons engaged or interested in law reform and to encourage professional self-development;
- (vi) to cooperate with other organizations which tend to promote the objects of the corporation.

The second item relates to the appointment of the Director, Professor Peter J.M. Lown, as Chairman of the Uniform Law Section of the Uniform Law Conference of Canada. This position, and chairmanship of the Steering Committee for the Section may result in greater cooperative effort on potential projects. Two examples of projects which have benefited from review by the Conference are the Reports on Trade Secrets and Arbitration, both of which were approved as Uniform draft Acts.

INSTITUTE PUBLICATIONS

At the time of adoption of a project by the Board, the recommendations of the Project Selection Committee will have identified the parameters of that project, the working methodology which is to be adopted with respect to the project, the likely work output, the resource costs of the project, and the socio-political climate which may lead to adoption of the proposals evolved.

The Institute publishes four kinds of documents. First, sometimes it publishes pure research papers. These are papers where, for one reason or another, in the course of a project, it is thought necessary to do some pure research (whether of a doctrinal or empirical variety) and it is thought useful to disseminate the results of that work for the benefit of other researchers or the legal profession.

A second document is what the Institute terms an Issues Paper. A document of this variety is usually in the early stages of a project. It will outline the nature of the problem which the Institute is considering, broadly what the present law is, and suggest the sorts of issues which the Institute thinks may need to be addressed, and possibly advance some tentative proposals. A document of this character is intended to be very much a preliminary and consultative one and to enable Institute staff and the Board to check whether the Institute has, in the eyes of knowledgeable observers, correctly perceived the problems arising and the sorts of things which need to be addressed. An Issues Paper is not distributed in every project; it entirely depends upon the parameters and circumstances of the particular project.

A third kind of document published by the Institute is a Report for Discussion. This corresponds to what, in some law reform agencies, are called Working Papers. This is a much fuller document than an Issues Paper. It usually outlines with much greater precision the existing law, the issues, the solutions or directions the Institute is proposing, and frequently carries the matter to the stage of draft legislation. The purpose of such a document is again consultative. It is to allow both professional and public input on the Institute's proposals before a Final Report is made.

A fourth category is the Final Report. As a matter of convention, although it is not a requirement, the Institute "reports" through the Department of the Attorney General, to the Attorney General. A Final Report is the position taken by the Institute after all due deliberation, and almost invariably includes suggested legislation.

All four categories of documents are widely distributed. Approximately 2,500 copies are printed. Distribution is broadly as follows: all government department, all members of the Legislature and Cabinet, all members of the Judicial ranks, all legal firms in the province, all law libraries in the province, all law reform agencies in the British Commonwealth, a large number of other selected Canadian depositories, and approximately 400 law libraries in the western world. It is open to any individual member of the profession to request that that person's name be put on the Institute's mailing list. Copies are distributed free of charge.

Each report contains an Executive Summary, and copies of this Executive Summary are mailed to each individual member of the practising bar in the province, and to those individuals whose interest has been identified during the course of the project. As many as 7,000 copies of the Executive Summary may be distributed.

THE YEAR IN REVIEW

During the year, the Insitute issued four final Reports, one Report for Discussion and one Research Paper, in addition to the usual Annual Report. The details of the reports are as follows:

Final Reports

1. **Enforcement of Money Judgments** (Final Report No. 61, March 1991)

This Report, is published in two volumes with an additional separate volume containing a Summary of the Report. The Report contains 161 recommendations, which are woven into a single model statute called the *Judgment Enforcement Act*. The Report includes an annotated *Judgment Enforcement Act*, with cross-references to existing statutory provisions. Each chapter contains a summary and an explanatory chart to show visually how the recommendations are organized.

The Report, which follows and compliments an earlier final Report on Pre-judgment Remedies, represents one of the largest and most time consuming projects in the Institute's history. It includes proposals for a total rationalization of the system of enforcing money judgments and subsumes many sub-topics within its purview.

The Summary of the Report and its conclusions is as follows:

Introduction

A just and efficient process of debt enforcement is fundamental to society. The operational maintenance of our enforcement system has been seriously neglected. Its justness is occasionally suspect and its efficiency is clearly deficient. A major and comprehensive overhaul is long overdue, and in the overhaul, the interests of creditors, debtors and society must be rationalized and balanced.

This report contains our final recommendations on the issues that we raised in our Report for Discussion No. 3, *Remedies of Unsecured Creditors*, 1986. That report identified several general principles confirmed and applied in this report. These include:

- a) Universal Exigibility: All of a debtor's property should be subject to enforcement, excepting only such property as is deliberately excepted.
- b) Just Exemptions: Such property as the debtor reasonably requires for the maintenance of his family should be deliberately exempt.
- c) Sharing among Creditors: The proceeds of enforcement processes should be shared among enforcement creditors.
- d) Creditor Initiative: The enforcement system should continue to be creditor driven.
- e) One Statute: The entire enforcement system should be governed by one consistent, coherent and logically ordered statute.
- f) Judicial Supervision: The enforcement system should operate with a minimum of judicial supervision, but there should be ready access to the court when directions are required.

In addition, the specific recommendation contained in the Report for Discussion, that imprisonment for debt should continue to be prohibited, is confirmed.

The Writ of Enforcement

The first step in the enforcement process is to interfere with the debtor's ability to alienate his or her property so that it can be used eventually to satisfy the debt owed to the creditors. At present, this is accomplished by delivering a writ of execution to a sheriff. The writ is the document by which enforcement is usually commenced, though it is not required for all processes.

The effect of delivering the writ is to "bind" the debtor's exigible property in that sheriff's judicial district. Only property exigible at common law, generally "tangible" property, is bound—intangible property that was made exigible by statute is not bound. When property is "bound", any transfer of it by the debtor will be subject to the writ. An exception is made for transfers to bona fide purchasers for value who have no knowledge of the outstanding writ. The exception diminishes greatly the significance of the "binding effect".

When the *Personal Property Security Act* comes into force, the system will change slightly. With some significant exceptions, the protection for bona fide purchasers for value will end with the registration of the writ in the Personal Property Registry (PPR). We think that the introduction of this new regime will facilitate more fundamental reforms.

We propose that a writ be delivered to the sheriff before *any* enforcement process is commenced. We suggest that the new instrument be called a "writ of enforcement". It should set out the particulars of the judgment that the creditor has obtained and should authorize the sheriff to accept and follow lawful enforcement instructions from the creditor. Delivery to the sheriff should not interfere, however, with the debtor's ability to alienate his property. This latter effect, the "binding effect", should occur when the creditor registers the writ in the PPR.

After the writ is registered in the PPR, no one should be able to take an interest in the debtor's exigible personal property (whether exigible by common law or statute, and including garnishable debts) except subject to the writ. Exceptions should be made, however, where a debtor grants an interest to a third party in:

- a) goods in the ordinary course of the debtor's business;
- b) consumer goods worth \$1000 or less;
- c) a negotiable instrument; or
- d) property against which encumbrances must be registered by serial number

where the third party takes the interest for good value and without knowledge of the writ. Persons who take money for value from a debtor should not be affected by a writ, even if they have knowledge of it.

The debtor's interests in land should continue to be bound when the writ is registered as provided in the *Land Titles Act*.

The consequences of delivering a writ to a sheriff and of registering it in the PPR should be province wide and not confined to any one judicial district. We propose the establishment of a computerized "Enforcement Registry", access to which can be had by any sheriff's office to facilitate this and other recommendations that we make concerning the operation of the enforcement system.

The binding effect of the writ should be subject to any security interest in the bound property that existed before the binding effect commenced, whether or not the security interest is registered in the PPR, as long as it is registered before seizure under the writ is effected.

A writ should be valid if issued at a time when the judgment on which it was based is in force, and should continue in force while the judgment remains unsatisfied and in force.

Discovering Debtors' Assets

Before the creditor can instruct specific enforcement processes, he or she must have some specific information about the debtor and his or her assets. This information is usually obtained by extrajudicial means.

We reject the suggestion made in other jurisdictions that debtors should be required to complete a questionnaire on their assets when a writ is filed against them. Enforcement of such a requirement would be too difficult. We propose, however, that a debtor who wishes to inform his or her creditors voluntarily as to the extent of his or her assets—probably to establish that he or she cannot pay the debt—should be able to file a statement of assets with the sheriff.

There is one judicial process currently available to creditors for use in gathering information about the debtor's estate: the examination in aid of execution, although many creditors consider this process to be of limited usefulness. The main problem seems to be in getting the debtor to attend and submit to examination. We do not think much can be done to eliminate this problem, or to improve the usefulness of examination in aid generally. We do suggest that, as an alternative to an order requiring attendance or a contempt order where a debtor has not attended as required, the court be empowered to issue an order that the debtor be arrested for examination. We also suggest that the fact that an examination has been held should be recorded in the Enforcement Register so that other creditors can order a transcript.

We suggest also that a creditor be able to apply for an order requiring a third party who has information concerning a debtor's estate to reveal it to the creditor. In the case of information held by a municipality as to the interests in land owned by the debtor, a court order should not be required. The creditor should be given the information upon providing the municipality with a certified copy of the writ of enforcement and paying a reasonable fee.

Seizure: The General Process

The seizure process is not in need of radical reform; however, there are several elements of it that should be adjusted to remove or reduce operational friction.

We believe that seizure should continue to be conducted exclusively by the sheriff and the sheriff's officers. Private bailiffs should not be used for enforcement seizures. The sheriff's authority to seize should be province wide, and not be limited by the bounds of the sheriff's judicial district. Creditors should be able to instruct any sheriff to conduct seizure, and the instructions should be assigned, where necessary, to the sheriff who can carry them out most efficiently. Written seizure instructions should continue to be required and should not be accepted unless the creditor issuing them has a subsisting writ of enforcement. The instructions should include sufficient information about the debtor or the debtor's assets to permit the sheriff to attempt seizure, seizure documents, and indemnification for the sheriff's fees and charges. Given the assurance fund that we propose in Chapter 11, however, no security for losses suffered as a result of the sheriff carrying out the instructions should be required.

A seizure should be considered effected when the sheriff has attended at the place where the property seized is located, has communicated the intention to seize to any person present and having custody of the property, and has identified the property on the notice of seizure. If the notice of seizure is not served on an adult person at the time of seizure, it should be served thereafter on the debtor. Such service should not be a required element of the seizure, and it need not be effected at the time of seizure, but the time for filing a notice of objection should not begin to run until such service is effected.

No enforcement seizure should be made at residential premises between 9 pm and 6 am. We would make no alteration to the present bailee's undertaking system, except to have the form disclose the consequences of breaching the undertaking.

We believe that a seizure process established according to these proposals would serve all the necessary functions. It would identify the property to be subjected to enforcement, and it would communicate that fact to the debtor. Further, given the recommendations concerning the binding effect of the writ discussed above, the position of third parties would be unaffected by seizure. Their position would depend on whether or not the writ of enforcement had been registered in the PPR—seizure would not alter that position at all.

To effect seizure, the sheriff should have the statutory authority to enter upon the debtor's premises or the non-residential premises of a third party; however, without consent, the sheriff should obtain a court order before entering a third party's residential premises to effect seizure of the debtor's property. Such an order should be granted if a reasonable likelihood is established that the debtor's property is on the premises.

If force is necessary to gain entry to effect seizure, the sheriff should have a court order authorizing the use of force in all cases, except where the premises are the non-residential premises of the debtor. The sheriff should have authority, by statute, to break any interior closure to gain access to the debtor's property, once access to the premises itself has been obtained.

We believe that the introduction of the PPSA permits a simple means of effecting seizure of "serial-numbered property". As an alternative to the general process, a creditor should be able to effect seizure of such property by registering the notice of seizure against the property in the PPR. The notice of seizure would then be served on the debtor.

We suggest a procedure that is modelled on garnishment be used where the debtor's property is in the hands of a third party. A notice could be served on the third party requiring him or her to deliver the property to the sheriff or otherwise make it available for seizure.

We recommend no substantial change to the present "objection to seizure" process, although we do suggest that the debtor be given information that would assist in understanding that process, and we propose that the debtor be required to state the reason for objecting on the objection form. We would also fix the period during which an objection can be accepted at 14 days after service of the notice of seizure. Any objection received after that time should be rejected unless otherwise ordered. We would not alter the arrangement whereby the creditor must take the initiative to have the debtor's objection determined.

As to removal, the sheriff should be obliged to remove seized property anytime after the seizure if properly instructed. The sheriff should have no discretion in this regard.

The sheriff should not be confined to any particular method of sale, but should use the method that will maximize the return. The creditor should suggest a method of sale when instructing on a sale, and the sheriff should give notice of the method selected to the creditor and debtor, who should then have 14 days before the sale in which to object.

If the sheriff cannot obtain a reasonable price for the property, the creditor should be able to apply to the court for an order permitting sale at whatever price can be obtained, except that no such order should be required if the value of the goods is less than \$1000. The creditor should be eligible to be a purchaser, but if there is no competition for the creditor, the sale should not be concluded unless the price is reasonable and the debtor is given notice and the opportunity to object.

We would not alter the present law that the sale is subject to any defect in the title of the debtor. The sheriff's sale should not cleanse the title of any third-party interest; however, the sheriff should search for registered encumbrances and should inform prospective purchasers of these. Any purchaser who suffers as a result of a defect in the debtor's title should be entitled to compensation from the assurance fund. We believe that these reforms will eliminate any necessity for the price to be depreciated at the sheriff's sale because of uncertainty concerning the debtor's title.

Special Seizure Mechanisms

For some specific contexts, the general seizure process requires some modification. We consider contexts that we expect will arise frequently enough to justify special legislative treatment.

A. Enforcement Against Negotiable Instruments

Although it might be theoretically possible to permit enforcement against negotiable instruments to be effected by the service of a notice—similar to a garnishee summons on the party primarily liable on the instrument held by the debtor, we think that such a procedure would raise practical difficulties that could not be removed constitutionally in provincial legislation. Accordingly, we recommend that the general seizure process be used as the method of enforcement against negotiable instruments in the possession of the debtor.

As for realization on seized negotiable instruments, we think that the sheriff should have all the rights the debtor has to negotiate, present, collect or enforce the instrument. He should be statutorily constituted the agent of the debtor, with full authority to deal with the instrument in every way that the debtor could.

We would abolish the present provision of the Seizures Act that contemplates the sheriff paying or assigning seized negotiable instruments to the creditor because it does not include a means of determining the amount of the credit to be given to the debtor and does not accommodate the sharing principle. We think that the general "sale to creditor" recommendations in the previous chapter can be applied in this context.

B. Enforcement Against Securities

We define the category of securities so as to include all shares in corporations, as well as a wide variety of publicly traded interests, rights and obligations. For some purposes, all securities are treated alike. For other purposes, we distinguish between securities that are publicly traded, and securities that are not publicly traded. Because of the way that we define "securities", the latter category consists only of non-publicly traded shares.

So far as the method of actually effecting seizure is concerned, our main concern is to make sure that the mechanics of effecting seizure mesh with the mechanics of modern securities markets. In particular, we wish to take into account ongoing efforts to immobilize or "dematerialize" publicly traded securities and the prevalent separation of beneficial and registered ownership of such securities. Thus, we propose alternative methods for effecting seizure of securities. This would allow the sheriff to use a method of seizure that acknowledges the manner in which the debtor's ownership of the relevant securities is actually evidenced. Depending on the circumstances, seizure could be effected by any of three methods: 1) seizure of the relevant security certificate; 2) serving a notice of seizure on the issuer; or 3) serving a notice of seizure on a person, such as a broker, who holds the security for the debtor.

For the most part, our proposals do not distinguish between securities issued by Alberta and "foreign" issuers. The important question is whether or not effective steps can be taken in Alberta to assert practical control over the security; however, the court is empowered to make any order necessary to prevent anyone from being prejudiced by a conflict between the laws of Alberta and those of a foreign issuer's home jurisdiction.

Flexibility in the methods of seizure is not obtained at the expense of innocent third parties. A *bona fide* purchaser who obtains possession of a security certificate without knowledge that it is under seizure would be unaffected by a prior seizure. Similarly, a *bona fide* purchaser who acquires a security through a transaction that is settled through a securities clearing agency would be unaffected by a prior seizure, unless the purchaser knows at the time of settlement that the securities are under seizure.

While securities are under seizure, any dividends or other payments that would otherwise be payable to the debtor would instead be payable to the sheriff for distribution to enforcement creditors.

At present a serious impediment to effective enforcement against non-publicly traded shares is the restrictions on transfer that often attach to such shares. We conclude that the policy that creditors should be able to recover their debts out of the property of the debtor outweighs the policy that a corporation should control its membership. After generous opportunity has been given to a company to make some arrangement for the satisfaction of the debt without permitting sale of shares to a stranger, if satisfaction is not achieved, the sale should be valid notwithstanding corporate restrictions on share transfers.

We propose that, for the purposes of sale, the sheriff should be entitled to all the corporate financial information that the debtor is entitled to as shareholder, and also that the sheriff should be as free to make the same use of that information in effecting a sale as the debtor is.

C. The Debtor's Interests as a Secured Creditor

Security interests of a debtor offer two means of recovery—through diversion of the payments receivable from the debtor to the sheriff and through sale of the security instrument.

We suggest that, where the security is held in real property, the method of enforcement should be that applicable to interests in land. Where the security is held in a chattel, the method of enforcement should be that established by section 8 of the *Seizures Act*. In the new *Personal Property Security Act* regime, this procedure would require the filing of a financing statement by the sheriff for the enforcement in the PPR. The notice of enforcement and the objection documents would be served on the debtor.

The party obliged to make payment under the security instrument would be required to make payment to the sheriff instead of to the debtor on receipt of notice of the enforcement. If that party is in default of its obligations, the sheriff should be able to enforce the security just the same as the debtor could. The sheriff could sell the seized security interest using the same process that applies in the sale of any other seized property. The present requirement of a court order before such sale is redundant and should be abolished.

Land

The present process for enforcement against interests in land held by the debtor suffers such serious theoretical, procedural and practical inadequacies that there is rarely an enforcement sale of land; however, the writ of execution is generally registered at the land titles office to interfere with any attempt by debtors to deal with their land, and thus promote payment of the judgment to permit the completion of a land transaction. Our recommendations are intended to remove the impediments to enforcement against land while preserving the usefulness of the writ as an encumbrance on the debtor's interests in land.

To eliminate uncertainty as to whether or not particular interests in land are subject to enforcement, we recommend that it be established expressly in the new legislation that all interests in land are exigible, whether legal, equitable, registered, unregistered, or technically classified as interests in land or interests in personalty.

We recommend also that a distinction be made between the process leading to enforcement sale of land and the process by which land is encumbered by the writ of enforcement. The latter should continue to operate as it does at present — the creditor registers the writ in the general register (or, when that is abolished pursuant to as yet unproclaimed amendments to the Land Titles Act, against the title). But where the creditor wishes to have the land sold by the sheriff, the process should be commenced by registering and serving a "Notice of Sale", containing details of the proposed sale.

The three existing procedural restrictions on the enforcement against land, the requirement of a *nulla bona*, the delay of one year from registration of the writ, and the denial of land enforcement costs where the debt is eventually paid by some means other than sale of the land, should all be abandoned. In place of the one-year delay, we propose a six-month delay from service of the notice of sale. During that period, which could be enlarged or abridged, applications regarding exemptions and other process concerns could be made, and the debtor would have time to arrange for payment of the debt to avoid loss of the land.

As in the case of other enforcement sales, we propose that the sheriff should be able to use whichever method he considers most likely to produce the best return. The creditor would be given an opportunity to propose a method, and all parties would have a right to challenge the method chosen by the sheriff.

Instead of the sheriff having to obtain an order confirming sale when a buyer is found, he would give notice of the proposed sale to the interested parties. The sale would be confirmed by default unless an interested party applied to the court for an order requiring the sale not to be concluded.

In this chapter, we consider the effect of the Dower Act on enforcement sales and conclude that, contrary to the present law, a dower consent ought not to be required for an enforcement sale of a Dower Act homestead. Enforcement sale should bring the contingent life interest of the debtor's spouse in the homestead to an end.

We also consider enforcement against joint interests in land, and we conclude that, consistent with our recommendation that all interests in land should be exigible, it should be confirmed that this applies to jointly held interests. We recommend that the right of survivorship, which is part of the concept of joint tenancy, should prevail over the binding effect of the writ, so that on the death of the debtor, the non-debtor joint tenant would take the entire interest in land free of the writ.

As for unregistered interests in land, we propose that they be subject to the same procedure as registered interests where the land in question is patented. Where the debtor holds an interest in unpatented land, the enforcement process should be determined by the court on application.

Garnishment

Garnishment is probably the most effective enforcement process existing at present. Its mechanics operate relatively efficiently. Accordingly, we do not propose fundamental alterations to those mechanics, and garnishment will still be available upon the filing of an affidavit establishing the debt to be attached. By way of changes: we propose only that the sheriff take over the clerk's present role; that the provisions relating to garnishment be placed in the enforcement

statute, as opposed to the Rules of Court; that the debtor be given an express right of objection, which is only implied at present; and that compensation for the garnishee be established by regulation, with a minimum of \$25 per payment in.

We recommend the elimination of some of the present restrictions on the scope of garnishment. Probably the most significant proposal that we make in this regard is that future obligations that might reasonably be expected to arise out of an existing legal relationship between an enforcement debtor and a third party should be subject to garnishment.

Much of the chapter is given to discussing the details of this proposal. We envision the mechanics of garnishment of future obligations working in the same manner as garnishment of a current obligation. The garnishee would be expected to respond indicating whether or not he or she acknowledges the alleged legal relationship, any contingencies attaching to the obligation, and when payment can be expected to be made. Even where the garnishee denied the legal relationship, the summons would remain in effect. A garnishee who failed to respond would be liable for judgment just as in the case of a current garnishment. A summons would remain in effect for one year, but could be "renewed" at any time before the end of the year.

Other details discussed include the adjustment of the amount bound by a continuing garnishment when there is a change in the total of the subsisting writs of enforcement; a discretionary exemption available to the debtor to preserve the source of the future entitlement; the garnishee's right of set-off, the effect where the garnishee holds insurance in respect of the future entitlement; and payments into court in litigation between the debtor and the garnishee regarding the future entitlement.

We also propose that the scope of garnishment be enlarged to include:

- a) debts owed to the debtor and another jointly, subject to several provisions intended to protect the non-debtor joint obligee from prejudice;
- b) conditional debts, with the court having the power to waive conditions that can be waived without prejudice to the garnishee; and

- c) garnishment of funds in court in replacement of the present "stop order" procedure or an application under section 7 of the *Execution Creditors Act*.

Our previous conclusion that garnishment of wages should be retained is confirmed. To reduce the inconvenience to employers, we propose that a garnishee summons of wages earned in the current pay period should be caught only if the garnishee summons is served at least 10 days before the pay-day. If the pay period is less than 10 days, then service of the summons five days before the pay-day would be required.

Court-Ordered Enforcement

Although the general enforcement processes of seizure and garnishment, as modified by our recommendations, would have much greater scope than they have at present, there is still a need for the court to have jurisdiction to design an enforcement procedure for situations where the general procedures are ineffective.

Probably the most frequent context in which this will occur is that of equitable receivership. We recommend the continuation of that remedy, but with significant simplification of the principles governing the exercise of the discretion to grant it. The remedy should be available regardless of the nature of the asset in respect of which it is sought since all assets are exigible except those exempted deliberately. Further, the remedy should be available even in the absence of an impediment to the employment of a legal enforcement process. The only question should be whether or not it is just and convenient to order the receivership. We suggest several factors that a court can take into account when determining whether or not it is just and convenient in a particular case.

Only competent and willing persons whose integrity is warranted should be appointed. The sheriff could be the appropriate receiver in some cases. The duties and powers of the receiver should be set out by the court, but the statute should include a non-exhaustive list of powers and a minimum list of duties.

There might be cases where the general processes are ineffective but receivership is inappropriate. The court should have the power in such a case to order an enforcement process to suit the situation.

Where enforcement is frustrated by the debtor or a third party, the court should have the power to order that the debtor co-operate to the extent that it is in his or her power to do so. Such an *in personam* order would be enforceable using the court's contempt powers.

The *Imperial Judgments Act* charging order remedy is redundant to existing enforcement remedies and the ones recommended in this report and should be abolished. As sequestration is not used in an enforcement context in this jurisdiction, the report makes no recommendation with respect to it.

Exemptions

The principle of universal exigibility contemplates deliberate exceptions, and this chapter discusses these exceptions.

The policy foundation for the exceptions is that the operation of enforcement processes should be restrained to the extent necessary to protect debtors' present ability to maintain themselves and their families, to protect a measure of security that they will be able to maintain themselves and their families in the future, and to foster restoration of debtors' personal economy. To accomplish this, it is necessary to preserve from enforcement certain basic necessities, property a debtor uses to earn a livelihood and a portion of a debtor's income from employment.

In this chapter, we review the entire structure of enforcement exemptions and propose certain refinements. For the most part, we do not suggest alteration of the basic structure.

Basic Necessities:

Particularly, we deal with the exemption of food, clothing, shelter, furniture, a motor vehicle, medical and dental aids, and sentimental memorabilia. Our most significant proposals in this area relate to the shelter exemption and the motor vehicle exemption.

As for shelter, we consider in detail several criticisms of the present shelter exemption and conclude that, while most of them do not justify any change, a few do. We would confine the rural shelter exemption to debtors who gain the primary portion of their livelihood from farming the land on which the shelter is

located. In the case of the urban shelter exemption, we suggest that the proceeds of sale of land, which would be exempt if the debtor's equity did not exceed the monetary limit of the exemption, should themselves be exempt up to the amount of the monetary limit. Further, we suggest that the monetary limit of the exemption should not be effectively doubled where the property is co-owned by the debtor and another, as is now the case, but rather that the limit should be reduced so that it is proportional to the debtor's interest.

We observe that almost everyone who has a motor vehicle would find it difficult to carry on without it and propose that, for exemption purposes, a motor vehicle be considered a basic necessity. We suggest that the monetary limit applicable to this exemption be \$5000.

Livelihood:

The present livelihood exemption provisions are focused mainly on farmers. Although we suggest only minor changes to the substance of the farm exemptions, we propose that the legislation first focus on a general livelihood exemption and then deal with exemptions specifically intended for farm debtors.

We propose that a general livelihood exemption of \$10,000 worth of property required to earn a livelihood be substituted for the present tractor, motor vehicle, professional books and general tools of the trade exemptions.

Income:

We propose that the present minimum income exemption be replaced by a percentage income exemption. More specifically, we propose that there be a minimum income exemption of \$800 per month for a single debtor, adjusted according to a formula where the debtor has dependants. We suggest that 50% of the debtor's net income in excess of this minimum, and up to a maximum level, be exempt from enforcement. For the purposes of this exemption, "net income" would mean that remaining after statutory deductions had been made. The maximum would be triple the minimum.

We consider the effect of these proposals on the garnishee and propose that a straightforward "return form" be designed for use by the garnishee in calculating the exemption. A sample return form is included in the chapter.

Exceptions to Exemptions:

The present exemptions legislation creates a number of exceptions to exemptions from enforcement. We review all these and propose the abolition of some that we conclude are out of date or otherwise inappropriate. We recommend the continuation of qualified exceptions for debts arising from criminal activity, corporation and partnership debts, and alimony and maintenance debts.

Operational Issues:

We consider several operational features of the exemption provisions as well. We conclude that exemptions should exist as of right and not be dependent on the debtor claiming them. Further, a debtor should not be able to waive his exemptions contractually. We propose that the procedure ordained by the court in *Carmar Holdings v. Harpe* be incorporated into the statute. We suggest that the circumstances as they exist at the time the issue of exemptions is being determined should be the relevant ones. We propose that, where property that would be exempt except that it is worth more than a monetary limit is sold by the sheriff, that portion of the proceeds that equals the monetary limit should be paid to the debtor and should remain exempt in his or her hands, assuming that he or she does not mix it with other funds, for 60 days. In the case of land, we suggest that the "extended exemption" should last for six months.

So that the net effect of the recommendations that we make might be more easily appreciated, we include a table comparing the existing exemptions provisions with the ones that we propose.

Distribution of Proceeds

The *Execution Creditors Act* currently requires that the proceeds of enforcement be shared among all creditors who have a subsisting writ of execution filed with the sheriff. In this chapter, we consider the merits of this policy by comparing it to the main alternative — the common law first come, first served priority system. We conclude that the sharing principle is superior on a policy basis and recommend that it be retained.

Also, we recommend several reforms to the implementation of the sharing principle. First, we propose that it should be applied to all funds received by the sheriff because he holds a writ of enforcement. At present, the proceeds of some enforcement processes can escape the sharing regime; however, funds should not be shared if they do not come into the sheriff's hands. Accordingly, we recommend that there be no sharing of direct payments to a creditor. We support the continuation of the concept of "subsisting writs of enforcement", but we propose that the entitlement to share no longer be confined to those creditors who have filed writs with the sheriff making the distribution. Future distributions should be made on a province-wide basis.

We propose the abolition of three features of the present legislation. First, we suggest that the "certificate procedure", whereby a creditor who has not obtained a judgment can become entitled to share through a summary procedure, be abandoned. Generally, it is not used because it is procedurally complicated and does not provide any significant time-saving over the normal route to joining the sharing group. We propose also that the present 14-day "grace period", by which a distribution is delayed for 14 days after the distributable fund is received, during which time other creditors can join the sharing group, be abolished. We conclude that this 14-day deadline is no less arbitrary than the day the distributable fund is received. Finally, we propose that a little-used provision that contemplates a share being reserved for a creditor who is delayed in getting to judgment be abolished.

We propose that the distribution provisions should bind the Crown expressly and should be applied where the debt owed to the Crown is not entitled to some preference arising by virtue of statute or crown prerogative.

The present sharing system is criticized heavily because it does not reward the diligent creditor. We agree with this criticism, and we propose that a preference payment should be made out of the enforcement proceeds to the creditor whose diligence resulted in the distributable fund being obtained. We suggest that the "active creditor" should be entitled to the taxable costs of the successful enforcement process and to a further 15% of the remaining fund. Distributable shares would be calculated after the special entitlements of the active creditor had been deducted from the fund.

The application of the sharing principle to enforcement of land is given specific attention. At present, it is not clear that sharing applies to such proceeds. We recommend that sharing should apply to the proceeds of enforcement against land and to the distribution of excess proceeds of any other judicial sale of land where there are writs of enforcement on title. We propose that the proceeds should be first distributed among the title encumbrancers according to land titles priority principles, and then the funds allocated to writs of enforcement should be shared among the holders of all subsisting writs of enforcement, regardless of land titles priority and of whether or not they are registered at Land Titles.

We propose also that an equivalent procedure be used where chattels that are subject to chattel security other than writs of enforcement, in addition to writs of enforcement, are sold judicially.

Compensation for Loss

Mishaps can and do occur in the enforcement process. These mishaps can cause pecuniary injury to enforcement debtors, enforcement creditors or third parties. In this chapter, we propose the creation of an assurance fund as the exclusive source of compensation for injuries caused by such mishaps. The assurance fund would be funded by a levy on creditors imposed at the time a writ is filed in the Enforcement Registry.

Third persons who suffered pecuniary injury as the result of the accidental seizure, detention or sale of their property would be entitled to compensation from the fund. Enforcement debtors who suffered pecuniary injury as the result of a sheriff's or creditor's non-compliance with a requirement of the new statute should also be entitled to compensation. Finally, enforcement creditors who suffer pecuniary injury because of the negligent performance or non-performance of any of the sheriff's duties should also be entitled to compensation.

Injured persons would be required to look to the assurance fund for compensation, but in certain circumstances the latter would be entitled to compensation from the party actually responsible for the injury. The fund would be entitled to indemnity from the Crown if the loss was attributable to negligence or deliberate misconduct within the sheriff's office. A creditor whose instructions caused someone to suffer a loss that should have been foreseen by the creditor would be required to indemnify the fund. Similarly, a creditor whose negligent or deliberate failure to register required information in the Enforcement Registry

was the cause of a compensable loss would be required to indemnify the fund. Generally, creditors would not be required to provide any security for their potential liability to indemnify the assurance fund.

Although this chapter is concerned primarily with the matter of how to compensate injured parties for loss that does occur, it contains one proposal designed to reduce the potential for such loss. It is proposed that where a sheriff seizes property in which he has reason to believe a third party might have an interest, the sheriff must serve notice of the seizure on the third person. The third person must then assert a claim to the property within a defined period, or else be estopped from asserting any claim for damages resulting from the seizure or sale of the property. If the third person does assert such a claim, the instructing creditor (or failing the instructing creditor, any other enforcement creditor) must then apply to the court for a determination of the claim. If no application is made to the court by a creditor within a defined period, the sheriff would be required to release seizure.

2. **Status of Children, Revised Report, 1991** (Final Report No. 60, March 1991)

Introduction

Background to Report

In 1976, the Institute published *Report No. 20 on Status of Children*. In it, we recommended the abolition of the statuses of legitimacy and illegitimacy in favour of a law providing for the equal treatment of all children in relation to their parents and other kindred, regardless of the child's birth within or outside marriage. In 1985, the Institute updated its 1976 recommendations and published *Report No. 45 entitled Status of Children: Revised Report, 1985*. The update was undertaken at the request of the government following a review, by the Alberta Legislature's all-party Standing Committee on Law and Regulations, of outstanding Institute reports and the Committee's endorsement of the principles embodied in *Report No. 20*. Despite the request, legislation removing the discrimination against children on the basis of their birth outside marriage had not been enacted, although the *Parentage and Maintenance Act* incorporates some of our ideas in amended form for the limited purpose of maintenance.

United Nations Convention on the Rights of the Child

In 1990, Canada announced its intention to ratify the United Nations *Convention on the Rights of the Child*,¹ in the approval of which it had played a leading role. The *Convention* expressly protects children from discrimination on the basis of "birth or other status" in the areas covered in it. These areas include the right of a child: as far as possible, to know and be cared for by the child's parents (article 3.1), who have the primary responsibility for the upbringing and development of the child (article 18.1); where separated from one or both parents, to maintain personal relations and direct contact with both parents on a regular basis (article 9.3); and to be heard in any judicial and administrative proceedings affecting the child (article 12.2). These rights are governed, and may be modified, by the application of the principle of the child's best interests.

It is evident that the *Convention* supports and reinforces the Institute's recommendations for the equal treatment of all children in relation to their parents and other kindred, regardless of the birth of a child within or outside marriage.

In preparation for Canada's ratification of the U.N. *Convention*, the federal government has asked the provinces and territories to bring their laws into compliance with it. News of this request motivated this Institute to update and republish, for the second time, our recommendations for reform of the law on the status of children in Alberta.

Recommendation for the Enactment of a Status of Children Act

Report No. 20 set out a draft *Status of Children Act*. *Report No. 45* updated the text and recommendations contained in *Report No. 20*, but did not reproduce the draft Act. In this Report, we have chosen to update and publish the draft Act and to convert the text of the two previous reports into annotated comments on the sections of the Act.

¹ The *Convention on the Rights of the Child* was adopted by the United Nations on November 20, 1989; it came into force on September 2, 1990, on which date the twentieth instrument of ratification was deposited with the U.N. Secretary-General. As of November 15, 1990, 54 countries had ratified the *Convention* (meaning that they had accepted its terms and agreed to comply with them), and 130 other countries, including Canada, were official signatories to the *Convention* (meaning that they had acknowledged receiving notice of it).

In consequence, in this report we make only one recommendation, and that is for the enactment of the *Status of Children Act* that we propose.

Although the *Status of Children Act* is drafted as a separate statute, this is not essential. What is important is that all of the provisions be situated in one location. An option would be to locate them in a separate Part of an existing statute of general application. If the latter choice is made, we think that the *Domestic Relations Act* would be the appropriate statute.

Key Elements

Equal Status of All Children

As stated, the primary goal of the reform recommended in the proposed *Status of Children Act* is to put an end to discrimination, in law, against children born outside marriage by conferring equal status on all children in relation to their parents, and through their parents to other kindred.

Legal Incidents of the Parent and Child Relationship

The legal incidents of the parent and child relationship fall into two areas. The first area is the legal recognition accorded to the personal relationship between the parent and a minor child. The second area is the rights and obligations conferred in law in relation to maintenance and succession to property. With the exception of parental guardianship and the various incidents that flow from it, and an existing anomaly with respect to maintenance (discussed in E.(2)), all rights and obligations of a child born outside marriage, of a parent, or of any other related person would be determined as if the child were born within marriage.

Personal relationship between parent and a minor child

The guardianship of a minor child is the most important of the rights and obligations that can be entrusted to a parent. That is because a minor child is necessarily dependent and must look to adults for the fulfilment of the child's material and emotional needs. Guardianship is a responsibility: the rights and obligations associated with it exist for the benefit of the child, not the parent.

Section 7 specifies the parents who are guardians in law automatically from the birth of the child. The parents who are recognized as guardians are those persons from whom an affection for the child is assumed to flow naturally, and who, because of the nature of their relationship to each other, are thought to be most likely to exercise the rights and powers of guardianship in the best interests of the child.

The mother is a guardian in all cases – the indisputable bond with the woman who bears the child makes her the obvious first choice of person to carry that responsibility in most cases.

The father is a guardian if he satisfies certain presumptions of parentage. By analogy to the existing law which confers guardianship on the man who was married to the mother at the time of the conception or birth of the child or between these times, section 7 confers guardianship on a father who is married to the mother, has cohabited with her throughout the year preceding the birth of the child, or who marries the mother after the child's birth and acknowledges that he is the father. The result of these presumptions is that, under the Act, more minor children than at present will benefit from the guardianship of both parents immediately from birth or from such time thereafter as parentage is established.

Maintenance and succession to property

Under the Act, the financial rights and obligations of parents and children to each other and, through them, to other kindred, will be the same regardless of the birth of the child within or outside marriage. These financial rights and obligations include the right to the payment of maintenance and the right to succeed to property in the estate of a deceased relative. Equality is achieved by means of section 5, which mandates the equality of children for all purposes of the law of Alberta, and by consequential amendments to the existing statutes that provide for financial rights and obligations.

Determination of Parentage

Because significant legal consequences flow from the fact of parentage, it is essential that a method be provided to establish it. Section 8 follows the precedent of the existing law by providing for the identification of the parents of a child by presumption. The presumptions of parentage operate unless and until

they are disproved. Because the presumptions may be incorrect, do not cover all situations, and sometimes will conflict, section 9 provides a mechanism for the determination of parentage in court on a balance of probabilities. Where parentage is found, the outcome will be a declaration of parentage.

(a) Presumptions of parentage

Ordinarily, the mother will be the person identified, in the definition in section 1(h)(i) or (ii), as the woman who gave birth to the child or is pregnant and expecting to give birth to a child not yet born. Therefore, no presumption is needed.

The parentage of the father will be less readily apparent. Section 8 provides for the identification of the father of a child by one or another of five presumptions. The presumptions set up rights and obligations which exist mainly for the benefit of the child.

The first three presumptions are the presumptions that form the foundation for guardianship from birth, in section 7: marriage to the mother at the time of the conception or birth of the child; cohabitation with the mother throughout the year before the child's birth; and marriage to the mother after the birth of the child coupled with the husband's acknowledgment that he is the father of the child. The other two presumptions are: registration of a man as father under the *Vital Statistics Act*, s. 3, at the joint request of himself and the mother; and acknowledgment by both a man and the mother that the man is the father of the child. The latter two presumptions, as well as the former three, give rise to the financial rights and obligations that flow from the relationship between parent and child; they also may entitle a parent, irrespective of guardianship, to receive notice of, or give consent to, certain matters affecting the child.

The facts may support a presumption that more than one man is the father of a child. In this situation, both presumptions will stand until a court makes a decision between them. We think that most situations will sort themselves out and that allowing the presumptions of parentage to stand will help family life to go on as much as possible without litigation in court over parentage. If the question of paternity is raised in proceedings for a declaration of parentage under section 9 and there are conflicting presumptions, the court can make a decision on the balance of probabilities.

No presumption is provided where a court of competent jurisdiction has found a man or woman to be the father or mother of a child in another proceeding. That is because section 4 requires a question of parentage that arises in any other civil proceeding to be decided as if it had been raised in an application for a declaration of parentage under this Act. Formal proceedings of this kind are a desirable protection for everyone concerned. A decision about parentage should be made in proceedings to which the child and any alleged parent, if living, are parties and in which the far reaching consequences of the determination are understood.

(b) Declaration of parentage

Where it is necessary to determine parentage, section 9 provides a proceeding to obtain a court declaration of parentage. The proceeding makes it possible for a parent to establish parentage where the facts do not support a presumption of parentage under section 8, or where two presumptions of fact conflict. It also makes it possible for a court to declare the parentage -- whether of the mother or the father -- of a child who is the product of assisted human reproduction, a growing possibility in this era of rapid technological advancement.

The declaration takes effect for all purposes. In our view, this is preferable to requiring parentage to be proved by evidence whenever the issue arises in a proceeding in which a legal incident of the parent and child relationship is in issue -- a proceeding in which notice may be limited to the parties to the matter before the court and in which full trial process including interlocutory procedures may not be available.

An application for a declaration of parentage may be commenced by originating notice brought in either the Court of Queen's Bench or the Provincial Court, as provided by the definition of "Court" in section 1(b). The application may be made by a person claiming to be the father, mother or child or another person or the father of an unborn child. Section 10 requires notice of the proceeding to be given to those persons who stand to be affected by the determination; the persons who receive notice may be heard on the application. Where necessary, a full trial of the issue of parentage could be ordered. Section 17 provides for the regulation of the practice and procedure in the Provincial

Court by analogy to the *Alberta Rules of Court* and the procedures followed in the Court of Queen's Bench, so that the concurrent jurisdiction of these courts to determine parentage and grant a declaration will be exercised in the same manner.

Because the declaration establishes parentage for all purposes, and because mistakes can be made, the declaration may be set aside later, under section 11, in the event that doubt is later cast on the parentage supported by the declaration. Unless and until it is set aside, a declaration operates as the governing presumption of parentage under section 8(2) and (3).

No limitation period is placed on the establishment of parentage because, strictly speaking, a declaration of status has no creative effect; it merely recognizes and declares the personal status that exists. Although rights may be affected by it, the declaration itself does not have any remedial effect.

Where a remedy is sought with respect to one of the incidents of the parent and child relationship, the limitation period relevant to that incident should apply. In our *Report No. 55 on Limitations* we expressed our preference for applying the provisions in the general limitations statute to all claims. We favoured this position over the proliferation, in other statutes, of specific limitations periods that are different from the general limitation periods which we recommended. Under our recommendations, the general limitation periods applicable to claims for a remedy would be suspended during the child's minority. Otherwise, they would give the defendant immunity from liability unless the claim is made within two years after discovery of the facts warranting a claim or 15 years after the claim arose, whichever period expires first.

(c) Registration of parentage

Parents have the right, independent of guardianship in some cases, to be notified of certain matters relating to their child. It is not always easy for a person who is required to give notice or obtain consent to know of the existence of a non-custodial parent. The Act, in section 12, therefore requires the Director of Vital Statistics to establish a register of parentage in which persons claiming to be parents can register voluntarily. Registration will help ensure that parents receive notice or are contacted for consent where they are entitled to it. Similarly, it will aid those persons who are under a duty to give notice or obtain consent to locate parents who should be notified or whose consent should be obtained.

Consequential Amendments to Other Statutes

As stated previously, our guiding policy has been to make only those amendments that are necessary to give all children equal status, regardless of their birth within or outside marriage. The consequential amendments to other statutes do not otherwise reform the general law relating to guardianship, custody or access; the duty of maintenance that family members owe to one another; or succession to the property of a deceased person.

3. Enduring Powers of Attorney Final Report No. 59, December 1990)

This final report confirms the suggestions which were made in our Report for Discussion No. 7 produced in February of 1990. The enduring power of attorney enables people to plan for their own incapacity giving them freedom to choose someone whom they feel is most likely to act in their best interests. This ability promotes self determination and autonomy and enhances personal dignity.

The report endorses the proposal that an enduring power of attorney be used to plan for future financial management. The report then deals with a number of areas:

1. Safeguards

The power of attorney is a relatively informal method of granting a great deal of authority to the attorney. There would be too much risk of abuse if the attorney had unlimited power over the donor's estate and was accountable to no one other than the donor. It was necessary for the scheme to achieve a proper balance between safeguards and simplicity.

The major safeguards are the requirement that the power of attorney be in writing and signed by the donor; it must clearly state its enduring nature; it must incorporate a series of prescribed notes explaining in plain language the nature and effect of the instrument and it must be accompanied by a certificate of legal advice signed by a lawyer, stating that the donor attended before the lawyer and appeared competent to grant the power of attorney.

2. Powers and Duties of the Attorney

Normally there is no obligation on the attorney to exercise the authority which the power of attorney confer. However, if the attorney has the power to act but no duty to do so this may defeat the expectations of the donor and create a vacuum at precisely the time when the exercise of authority is needed. This potential problem is solved by stipulating that the attorney cannot renounce his or her appointment without leave of the court once the donor has become mentally incapable. In addition, in order to ensure that the attorney exercise the authority in as close a manner as possible to the wishes of the donor we would allow attorneys to exercise their powers for the maintenance, education, benefit and advancement of the donor's spouse and dependent children.

3. The Time When the Power Becomes Effective

Normally a power of attorney becomes effective immediately from the time it is created. Some persons would like the power not to become effective unless and until it is necessary. The proposed legislation would allow what is termed a "springing power of attorney" by specifying a future contingency upon the happening of which the power of attorney would take effect. Further, in order to determine precisely when and whether the contingency has occurred, the donor may name a third party who could conclusively determine that the contingency had occurred.

4. Protection of Attorneys

The current law stipulates that attorneys may be personally liable to third parties for acting as an attorney after their authority has been terminated, even if the attorney was unaware of his or her lack of authority to act. We propose that attorneys should be protected so that they would not incur personal liability for acting in breach of their authority unless they knew or ought to have known that their authority had been terminated.

5. Accounting Requirements

The potential for abuse of authority by unscrupulous attorneys is controlled by the ability of an interested person to make an application to the court requiring the attorney to bring in and pass accounts in respect of any or all transactions entered into by the attorney.

The explanatory notes which must be attached to the enduring power of attorney are attached. They are written in plain language intending to convey to the lay person the effect of the document and some of the precautions which the individual should take.

The Rainbow Report, the report of the Premier's Commission on Future Health Care for Albertans published in December of 1989 calls for the introduction of enduring power of attorney legislation in Alberta as quickly as possible. This proposed legislation which has been the subject of an extremely broad consultation within Alberta and with other interested groups and agencies across the country now meets that demand. It would fulfill a need which is currently not met by existing legislation.

Explanatory Notes

Read These Notes Before Signing This Document

1. The effect of this document is to authorize the person you have named as your attorney to act on your behalf with respect to your property and financial affairs.
2. Unless you state otherwise in the document, your attorney will have very wide powers to deal with your property on your behalf. The attorney will also be able to use your property to benefit your spouse and dependent children. You should consider very carefully whether or not you wish to impose any restrictions on the powers of your attorney.

3. This document is an "enduring" power of attorney, which means that it will *not* come to an end if you become mentally incapable of managing your own affairs. At that point your attorney will have a duty to manage your affairs, and will not be able to resign without first obtaining permission from the court. The power of attorney comes to an end if you or your attorney dies.
4. This document takes effect as soon as it is signed and witnessed. If you do not want your attorney to be able to act on your behalf until after you become mentally incapable of managing your own affairs, you should state this in the document.
5. You can cancel this power of attorney at any time, so long as you are still mentally capable of understanding what you are doing.
6. You should ensure that your attorney knows about this document and agrees to being appointed as attorney.

4. Division of Canada Pension Plan Credits in Alberta (Final Report No. 58, November 1990)

Background

The Alberta Law Reform Institute has considered the implications for Alberta law of the 1987 amendments to the credit-splitting provisions of the *Canada Pension Plan Act*. Under the old law, a divorcing spouse was entitled to a half-share of the total CPP credits accumulated by both spouses during the marriage, but had to apply for the division of credits to take place. The amendments remove the requirement for application. Division is now to take place when the Minister receives notification of the fact of divorce and other information necessary to effect the split. The new provisions also allow the provinces to pass legislation that would permit spouses to make spousal agreements to opt out of the division of credits.

The Canada Pension Plan is a contributory, partially-funded plan, which requires contributions throughout an employee's working life. The amount of pension resulting from these contributions is based on the number of months of employment, and on average earnings. Coverage extends to the spouse of the

contributor: in an enduring marriage the non-contributing spouse is entitled to a share of the benefits; in case of the death of the contributor the spouse receives a survivor's pension; and on matrimonial breakdown the spouse is entitled to a half-share of the total credits.

Unlike provincial employment pensions, which are a form of optional, tax-sheltered savings and may sometimes be refundable on termination of employment, the CPP is mandatory and non-refundable. It is designed to further social policy by providing a basis for a retirement income for all working people and their spouses. The purpose of mandatory division of credits within that scheme is to ensure that retirement income will be available to women, who (because of past family commitments or generally lower earnings) suffer disproportionately from poverty in retirement.

The scheme created by the CPP Act for sharing of pension credits is essentially different from the method of property division specified by the provincial *Matrimonial Property Act*. The Institute asked whether in light of this basic difference, credit-splitting is an acceptable mechanism for dealing with the asset.

Alberta does not now have the legislation that would allow spouses to opt out of credit-splitting. The Institute considered whether Alberta should enact such legislation.

The 1987 CPP amendments have created two points of uncertainty. First, there is confusion among the legal profession and in the case law about the current status of opting-out clauses in spousal agreements. Though opting-out legislation has not been passed, spousal agreements are still commonly written to include a waiver of the CPP rights of the non-contributing spouse. Can these agreements be upheld? Second, does CPP credit-splitting have the effect of removing CPP credits from the pool of matrimonial property and the domain of matrimonial property law?

Institute Recommendations

In this report, the Institute makes the following recommendations to answer these questions and to resolve the uncertainty about CPP credit-splitting as it applies in Alberta:

Recommendation 1:

We recommend that the provisions for credit-splitting on matrimonial breakdown under the CPP Act be recognized as an acceptable mechanism for achieving the policy goal of the legislation, regardless of any conflict in principle with the scheme for property division on matrimonial breakdown under our provincial law.

The Institute recognized the importance of the goal of reducing the poverty of women in retirement, and regarded credit-splitting as one acceptable, if imperfect, method for achieving this goal. The Institute concluded that although credit-splitting imposes a method of dealing with accumulated assets different from that provided for under the *Matrimonial Property Act*, there is no constitutional conflict between the two sets of provisions: each can operate in its own sphere. The social purpose of the CPP scheme justifies the special treatment.

Recommendation 2:

We recommend that provincial legislation contemplated in section 55.2(3) of the CPP Act, which would permit spouses to agree that there is to be no division of CPP credits, not be enacted.

The Institute rejected a number of possible justifications for taking up the legislative option. It rejected the idea that a conflict exists between credit-splitting and existing provincial matrimonial property law. Other arguments in favour of allowing opting-out (consistency with the treatment of other assets; allowing spouses greater flexibility) were similarly rejected. None seemed to outweigh the social value of assuring the income security of non-contributing spouses. Inalienability was seen as an essential element of the CPP scheme.

Recommendation 3:

We recommend eliminating uncertainty in the existing law by enacting legislation that declares that provisions in spousal agreements that purport to waive or alienate a spouse's share of CPP credits or benefits are void.

At present, waivers of the non-contributor spouse's right to CPP credits are commonly included in separation and settlement agreements. The effect of these waivers made in the absence of provincial opting-out legislation is not clear. Even when a spouse has agreed to waive a right to the credits, he or she may later

apply to the Minister for credit-splitting, and unless the province has passed opting-out legislation, the Minister will divide. If the contributor spouse attempts to recover the value of the credits by a court action to enforce the agreement, the outcome is uncertain.

The Institute pointed out that the only certain course at present is to negotiate property agreements anticipating that division will take place. The Institute's recommendation that any waiver by the non-contributor spouse of the right to CPP credits or benefits be declared void would make this the only course.

Recommendation 4:

We recommend that credit-splitting under the CPP Act is not to be interpreted as removing CPP pensions from the reach of provincial matrimonial property law. Though the right to credits is to be inalienable, the fact of equal division may be taken into account in determining the division of the remaining property.

Matrimonial property law covers all accumulation of property or economic gains during the marriage. Thus CPP pensions are within the scope of the *Matrimonial Property Act*. Where, as in most cases, division of matrimonial property is equal, including CPP would have no impact on the division of the remaining property. However, where division is unequal, the equal division of CPP benefits would be a factor to be taken into account in the division of the remaining property.

Making Credit-Splitting Automatic

In preparing this report to answer these questions, the Institute's research revealed that although the recent amendments were designed to make splitting automatic, this is not yet happening. At present, one or both of the parties must notify the Minister of the marriage breakdown and supply the information necessary to calculate the credit split. Ignorance or apathy of spouses about their rights may be the factor that is most significant to the existing low rate of requests for credit-splitting. The Institute points out the need for a mechanism to be created by the federal authority for routinely notifying the Minister of the fact of divorce and related information. Only then will non-contributing spouses receive the credits to which they are entitled in all cases of divorce (except where they had agreed otherwise in provinces with opting-out legislation).

Reports for Discussion

Towards a New Alberta Land Titles Act (Report for Discussion No. 8, August 1990)

The Institute has had a long-standing interest in the Land Titles Act. In 1978, it arranged for the publication by the Alberta Law Review of the monograph entitled *Torrens' Elusive Title*² which was prepared by Professor Thomas Mapp as counsel for the Institute and which represents the fruits of his extensive research and analysis in the field of interest recording and title registration. By 1987, Professor Mapp had found time to draft an interest recording and title registration statute.

In that year, 1987, the Institute discussed this project with representatives of other provinces and the two territories. Those representatives thought that a model statute suitable for general use in Canada should be prepared, and the Joint Land Titles Committee was accordingly struck to prepare it. The Joint Committee includes representatives of the governments of all the provinces and territories of Canada except Quebec and Newfoundland (though the representation of the Maritime Provinces has been through the Council of Maritime Premiers). It also includes representatives of the law reform agencies of British Columbia, Alberta, Saskatchewan and Manitoba.

The Joint Committee started its work with Professor Mapp's draft statute. It met at Edmonton in November 1988, at Vancouver in March 1989, and at Toronto in October 1989, to discuss the issues and to consider further drafts which were prepared to give effect to the Joint Committee's evolving views. The Joint Committee's work has now culminated in the report mentioned above and in the preparation of the Model Land Recording and Registration Act.

The Institute has had the carriage of the joint project. The drafting of the statute was primarily done by Professor Mapp, and the report and annotations were drafted by W.H. Hurlburt. However, the Model Act is a collegial product and the issues have all been discussed and decided by the Joint Committee.

² Published as Volume 1 of the Alberta Law Review Book Series.

The Joint Committee has done its work and produced its Model Act. The Institute proposes to encourage, and to participate in, a broad discussion of the Model Act in Alberta, in the hope that the Model Act will be found a useful foundation for provincial legislation.

In order to prepare for the integration of the proposals into the Alberta law, a Report for discussion was prepared as a companion document to the Joint Report. The implications of the proposals on Alberta law and high-lighted for discussion purposes.

The Alberta interest recording and title registration system has, on the whole, served the province well. It has proved flexible and capable of evolving to meet changing circumstances. However, its formal legal foundation, the Land Titles Act, still reflects discarded notions from earlier times, and the successful evolution of the system has been accomplished by judicial, professional and administrative creativity, which has been hampered rather than facilitated by the statute. A new statement of the law, rationalized and brought into line with the evolving Alberta system, is needed. Specific problems have been dealt with from time to time by specific amendments to the Land Titles Act, but the statute as a whole is not a satisfactory foundation for a modern system.

The most important departures from the original Torrens system are:

- (1) Alberta law recognizes unregistered interests. An unregistered conveyance immediately confers an interest. The interest so conveyed is vulnerable to the registration or caveating of conflicting interests, but in the meantime it is fully effective.
- (2) Alberta law provides a system of protection of the priority of unregistered interests through the caveat. The caveat is used as a permanent form of protection for unregistered interests. It is not a mere blocking device to give a claimant time to perfect an interest, as it is under a pure Torrens system.
- (3) Although Alberta law, through regulations under the Land Titles Act, prescribes forms for registered documents, conveyancers can add provisions at will (though they may encounter difficulties if the added provisions change the legal nature of the interest conveyed).

These departures have been made because the original Torrens system theory was too rigid and did not meet felt needs. A system of priorities for all interests has been developed because business efficiency and the interests of landowners require it and because it is not inconsistent with facility of transfer. Flexibility of registrable forms is required for purposes of business efficiency. Unregistered interests are recognized because a draconian and often unjust refusal to recognize them is not required by considerations of business efficiency.

The Report then details five areas in which the proposed Model Act would differ from the conventional Torrens theory. These areas are:

- (1) Recognition of unregistered interests, which would be effective from the time of transaction and such interests would be enforced in accordance with common law priorities.
- (2) Effective caveating/interest recording. Part 4 of the Model Act would substitute a clearer and more comprehensible interest recording system which in essence is the same as the present caveating system.
- (3) Effective registration. The Model Act would rationalize the interpretations of the *Land Titles Act* which have developed over the years to bring some standardization to the affects of registration on the creation or termination of a registration, the interest which can be registered and the question of overriding interests.
- (4) Volunteers. The Model Act would provide for a registered interest to have priority, even if no value was actually given. This represents a significant departure from the existing law.
- (5) Fraud. The Model Act would confirm the existing policy that an owner who obtains registration by fraud is not entitled to the protection of the statute. But greater precision is provided in determining the kind of fraud which will determine the priority between a registered holder and a the holder of prior unregistered and unrecorded interest.

Joint Committee Report

Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada (July 1990)

Source of report and Model Act

This is the report which is referred to and commented on in Report for Discussion No. 8 which examines the effects of the general proposals contained in this report on the current position in Alberta.

The report, and the Model Act which embodies its proposals, have been prepared by a Joint Land Titles Committee consisting of land registration officials from Alberta, British Columbia, Manitoba, the Council of Maritime Premiers, Northwest Territories, Ontario, Saskatchewan and the Yukon.

Purpose of Model Act

The basic purpose of the Model Act, like any system of interest recording and title registration, is to make acquiring and disposing of interests in land easy, quick, cheap and safe, while protecting security of ownership.

The Model Act is intended to improve the efficiency and maximize the utility of interest recording\title registration systems by stating basic principles more clearly and coherently, by resolving previously unresolved problems, and by making some policy changes to accommodate title registration law to current and future needs. It will not change basic principles. It will facilitate current practises.

Reasons for revision of title registration statutes

Existing interest recording\title registration statutes are based on precedents more than a century old. Their language is opaque, misleading, and not suited to modern conditions. Their organization does not disclose the principles on which they are based. Their inclusion of much substantive law and administrative matter further obscures those principles. They require rationalization and modernization.

Nature of system proposed by Model Act

Most of the existing Canadian title registration statutes are really hybrid interest recording\title registration statutes. These hybrids have worked well, and the Model Act builds upon them by providing:

- (a) an interest recording system, under which an entry in a register confirms or confers priority of the interest according to the time of registration, but does not confer ownership; and
- (b) a title registration system, under which an entry in a register stating that a person is registered as owner of an interest in land both confirms or confers legal ownership of the interest as a matter of law and confirms or confers priority of the interest according to the time of registration.

Interest recording system

Recording under the Model Act will have much the same effect as lodging or registering a caveat under the Canadian Torrens-based statutes other than British Columbia, entering a notice under section 74 of the Ontario Land Titles Acts, and registering a deed under the deed registration systems which exist in parts of Manitoba and Ontario, all of which are different versions of interest recording systems. It will be effected by submitting to the Registrar either a document conferring an interest or a document summarizing an interest. The Registrar will not examine a document submitted for recording to see that the interest claimed is valid.

The recording of an interest which is a prior interest under the general law will maintain its priority over subsequent interests. The recording of an interest which is a subsequent interest under the general law, if the holder of the subsequent interest has given value and is not guilty of fraud, will confer on the subsequent interest priority over all other interests which were not recorded when the subsequent interest was obtained and recorded. The priority so obtained will benefit a successor as well as the person who records the interest.

Under the recording provisions of the Model Act, any interest in land can be recorded.

Title registration system

The title registration system proposed by the Model Act is the same in broad outline as existing title registration systems. It will apply to estates in fee simple absolute and to a number of the better known and most widely used lesser interests, of which leases and security interests are examples. It will confer legal ownership of an interest upon the registered owner of the interest.

Under the title registration provisions of the Model Act, a registration obtained by the fraud of the registered owner can be set aside, but not a registration obtained by an innocent successor of the fraudulent party. A registration which is not based upon a valid transaction (for example, a registration based upon a forged or unauthorized transfer) can be set aside before an innocent successor is registered, but if the "transferee" believed the transfer to be valid, the Court will be able to award ownership to either the transferee or the displaced registered owner and compensation to the other, with a presumption in favour of restoring the displaced registered owner and compensating the transferee.

Under the title registration provisions of the Model Act, an estate in fee simple absolute and a number of other well-known and understood interests in land may be registered.

Other matters

The Model Act opts for individual registers instead of the certificates of title which now, in some provinces, constitute a single register covering all the land within the jurisdiction of a land registration office. It contemplates the continuation of administrative and land identification systems along current lines. It contemplates the continuance of a system of compensation for losses sustained through the malfunctioning of the system, but emphasizes treating compensation as a business matter flowing inevitably from the measures taken to promote business efficiency.

Conclusion

It is the Joint Committee's view that the Model Act, if adopted, will provide a rationalized and helpful framework for dealings in land, will reduce confusion and uncertainty, and will maintain harmony among Canadian title registration laws among the provinces and territories of Canada.

Research Papers

Dispute Resolution: A Directory of Methods, Projects and Resources

(Research Paper No. 19, July 1990)

Two elements have led the Institute to take a look at activities relating to dispute resolution generally. The first element is the longstanding interest of the Institute in seeking improvements in law, in the administration of justice, and in the procedures and practices by and under which law is applied. The second element is the current groundswell of interest in improving existing dispute resolution processes and experimenting with new or hybrid methods.

As a first step in our own education process, we undertook to identify and describe the dispute resolution methods attracting current attention and to compile a list of dispute resolution projects and resources of recent origin that represent efforts to improve upon or supplement traditional legal means.

The information published in this document is the product of that study. We have decided to publish it now, in descriptive form, without further embellishment because the information is current and, we think, both interesting and potentially useful to members of the practising bar, judiciary and others. Moreover, it supplements the information contained in the report of the Canadian Bar Association (CBA) special Task Force on *Alternative Dispute Resolution: A Canadian Perspective* presented at the Annual Meeting of the CBA in August 1989, and our own research on the use of referees in court proceedings published earlier this year in Research Paper No. 18 (February 1990).

Form and Content of Research Paper

This research paper consists of four chapters. In Chapter 1, we have provided an introduction to the subject and to the research paper. In Chapter 2, we sketch the origins and evolution of the ADR movement, and explore the current state of ADR activity in Canada. In Chapter 3, we examine various dispute resolution methods. At the commencement of the chapter, we discuss of the classification of methods and the factors that affect the choice of method. We then describe five dispute resolution options associated with the ADR movement. The five options are: (i) mediation, (ii) private arbitration, (iii) negotiation/mediation/adjudication hybrids, (iv) court-connected methods of dispute resolution, and (v) the multidoor courthouse (intake screening and diversion). Chapter 4 contains descriptions of specific ADR projects and resources in Alberta, elsewhere in Canada, and in the United States. For Alberta, an attempt has been made to describe all significant ADR projects and resources currently in place. For other jurisdictions, examples are provided; the list is not exhaustive.

CBA Task Force Report: A Companion Document

In August 1989, a special Task Force of the Canadian Bar Association presented its report on *Alternative Dispute Resolution: A Canadian Perspective* (the "CBA Report") at the Annual Meeting of the CBA in Vancouver. This landmark study is the product of a national Task Force chaired by Ms. Bonita Thompson, Q.C. of Vancouver. It should be read as a companion document.

The CBA report, predictably, approaches ADR from the perspective of the interest of the legal profession. This perspective shares much in common with that of legislators and law reformers, but does not provide an exact match.

The report is divided into four parts. In Part I, the Task Force has examined the meaning of ADR. In Part II, it has looked at three aspects of ADR in Canada: applications in substantive areas, institutionalization, and education. The discussion of applications in substantive areas covers the seven areas of: labour law, family law, criminal law, environmental law, native law, commercial law and public law. Institutionalization is considered under four heads: the courts, legislation, professional organizations and community organizations. The

section on education includes: law schools, continuing legal education, judicial training, the interdisciplinary character of ADR and schools. In Part III, the Task Force has explored six policy issues in ADR. The questions asked are:

- (1) what is the role of the legal profession in the development of ADR?
- (2) what steps need to be taken to ensure the provision of quality services?
- (3) should ADR be attached to the courts?
- (4) should ADR be mandatory?
- (5) should legislation be used to support ADR?
- (6) who should pay for ADR services?

The Task Force recommendations are presented in Part IV of the report. (Part IV is reproduced as an appendix to this Research Paper.)

WORK IN PROGRESS

The Institute tries to maintain a balance between the different types of report which it produces, and the stages of particular projects. The reports which we have produced over the last two years have indicated an effort to bring a number of projects to completion. This year five of the seven reports which have been issued have been final reports. As a result, the work in progress for the year concentrates more on Reports for Discussion than final reports.

Canadian Depository for Securities

This project was originally assigned to the Director and the Institute completed its major policy review in June of 1989. It then awaited the completion of certain agreements among the regulatory agencies which would complete and describe the regulatory environment in which the Institute proposals would operate. In addition, the Institute sought responses from the operator of the depository system with respect to some of the issues which arose during the project research. The Board has reviewed the status of this project and reviewed updated summaries of the issues from time to time during this fairly lengthy project, and the project has continued notwithstanding the delays on other levels, including both the complementary agreements and the views of the operator.

It is expected that the draft Report for Discussion will be reviewed by the Project Committee during late summer and early Fall of 1991 and will be approved and issued by the Board during Fall of that year.

The issues divide conveniently into three categories. The first category relates to the operation of the depository system and the effect of the depository system on the legal relationships involved in the shareholding situation. The second category concerns legislative issues and how the depository system, if desirable, can best be accommodated in the Business Corporations Act, and the other statutes which are affected by a depository system. The third category relates to clearing and settlement issues, in particular the questions of *bona fide* purchasers and adverse claims.

We are fortunate that we have had the expertise of Mr. Eric Spink who joined the Institute as Legal Counsel in September of 1990. His experience in the securities industry has helped in this quite technical and complex area.

Mortgage Remedies

This project, under the carriage of Janice Henderson-Lypkie, involves a comprehensive review of the law and rules relating to foreclosure procedure. In order to put our recommendations in context, the report will contain a thorough analysis of the existing law and practice, the operation of the mortgage industry in Alberta, and the availability of remedies in other Canadian jurisdictions.

Two of the significant issues which we will be examining relate to the scope of deficiency protection, that is, which borrowers with respect to which property should be protected as to deficiencies; and when, if at all, should private sale, or sale to the lender be permitted.

We expect a Report for Discussion to issue in mid-1991.

Section 14 of the Interpretation Act

The Institute has completed its initial review of the policy issues relating to a potential reversal of section 14 of the Interpretation Act. The Institute is now attempting to obtain detailed information from Crown Agencies describing the effects of potential reversal of section 14. The purpose of this review is to analyze the arguments that can be made in favor of the existing section 14. Once those comments have been obtained and analyzed a Report for Discussion will issue.

Crown Liability

This project was under the charge of Professor John Law during a secondment to the Institute from the Faculty of Law at the University of Alberta. Our original intention was to prepare a companion document to the report of the Ontario Law Reform Commission on Crown Liability. When the Ontario report became available to us, the Board determined that it wished to deal with a number of issues which had not yet been addressed in the Ontario report. While the Ontario report dealt with many of the anomalies and proposed solutions, it was thought that our report might take the opportunity to conduct a broader longer term approach to some of the issues. In particular, there was some question as to whether the Crown ought to have a special status, either in terms of specific immunities, or in terms of specific liabilities in view of its unique position. The report will review the areas of tortious liability, injunctive relief and contractual liability from this type of perspective.

We expect a Report for Discussion which will thoroughly air some of these difficult issues to be produced by late Fall of 1991. Professor Law has returned to the Institute as a secondee for a short time to complete the discussion paper in its new focus.

Administrative Procedures

Our project was originally prompted by suggestions that there might be a lack of uniformity among administrative tribunals and that some method of standardizing powers and procedures would be appropriate. We have commenced initial review of the various models which are available and are currently collecting detailed and comprehensive information on all of the various levels of tribunal which operate in Alberta. This empirical task is a very large one. We hope that the data collection process will be complete by the end of Summer 1991 and that the analysis of the data can be incorporated into a Report for Discussion some time thereafter.

Cost of Credit Disclosure Legislation

This project was undertaken at the request of the Minister of Consumer and Corporate Affairs and Mr. Richard Bowes is preparing a compendium of policy issues for review by the Board. The major issue is whether or not there ought to be legislation requiring the disclosure of the details of credit. There are two models, the first calling merely for full and fair disclosure of the cost of credit, and the second setting out in more detail and with more precision the ways in which the relevant information should be disclosed. If the second model is chosen then there are further issues as to the method of calculation, the precision of the calculation, the differences between various industries and sectors of industries and the methods by which the requirements may be complied with.

This is an area which suggests uniform treatment across the country, since most businesses will be involved in extra-provincial activities. For this reason, the work of the Institute will be made available in Issues Paper form to the Uniform Law Conference of Canada for review in its 1991 meeting.

Fatal Accidents Act, Damages for Bereavement

The Institute is revisiting the question of damages for bereavement which it originally recommended in proposals for reform of the Fatal Accidents Act. There has been considerable public response to the operation of the scheme which the Institute proposed and the Institute has commenced a review of those operations along with possible modifications which might be made. A Report for Discussion should issue in early 1992.

Effective Dispute Resolution

After the publication of our Research Paper on Dispute Resolution in July of 1990, the Institute has continued its preparatory research in conjunction with the Law Society and the Court of Queen's Bench. The Institute is currently reviewing a number of areas including rules relating to discoveries, pre-trial conference and mini-trials, pre-trial directions and various aspects of case progress review. All of this is occurring within the Institute's general interest in

effective and efficient operation of the Dispute Resolution system. While the areas are interconnected and interdependent, the overall goal is to define smaller projects within the overall umbrella which can be dealt with in a manageable time frame and context.

Surrogate Court Rules

This joint project with the Surrogate Court Rules Committee is almost complete. Of nine major areas of review, one remains to be finally decided, and at that point a Report for Discussion will issue recommending draft Surrogate Court Rules. The areas which have been considered in this review are:

1. Table of Contents
2. Persons Entitled to Apply for a Grant
3. Notice Requirements
4. Bonds
5. Passing of Accounts
6. Contentious Matters
7. Proof in Solemn Form
8. Solicitor's Tariff
9. Compensation for the Personal Representative

The principal researcher in this area has been Ms. Anne de Villars who has guided the initial research and proposals for reform.

An additional component has been added on to this project relating to drafting of forms which will accompany the Surrogate Court Rules. The intention is to draft the forms in a way which will accord with the logical and chronological collection of information and in a manner which will avoid much of the duplication which is currently characterized in the Surrogate Rules forms. It is hoped that the forms will be both plain in language and plain in visual design.

Succession Legislation

The Institute has received funding from the Alberta Law Foundation to carry out a project which would rationalize the various pieces of succession legislation in provincial statutes.

Land Titles

Our Report for Discussion accompanying the joint report, *Renovating the Foundation of Land Titles* was issued in the Fall of 1990. Subsequent to that time consultations have been held across the Province with various persons and entities affected by the Land Titles system. As a result, a number of areas have been subject to review and refinement. It is hoped that those areas can be reviewed by representatives of the other provinces involved in the joint report and that the final report which we expect to issue in October or November of 1991 will represent a consensus of all of those provinces.

Special Projects

Substitute Decision Making

As noted elsewhere in this report, the first phase of our substitute decision making project, powers of attorney for financial matters was enacted in legislation in the Spring 1991 Session. The second phase represents the extension of the concept of substitute decision making to the area of health care and personal care. The Board is expected to review a draft Report for Discussion in September of 1991 and that report will be issued for broad consultation thereafter. The report will examine the various models which are available for substitute decision making, will review the concept of a statutory list of substitute decision makers, and will address the important question of whether the advance directives ought to be binding or not.

Evidence of Vulnerable Witnesses

This Issues Paper was commenced by Professor J.C. Robb during the period of his secondment to the Institute from the Faculty of Law at the University of Alberta. Initially, the project was entertained because of suggestions for change in courtroom procedure to accommodate vulnerable witnesses, especially in cases such as child abuse. However, after early consideration, it was determined that the topic should be broadened slightly to review the question of whether or not our current rules of evidence operate as an impediment to the process of obtaining reliable evidence from vulnerable witnesses generally. The Board thought it important that the research be made available to the legal

community and the paper will review four different areas: Oaths and affirmation; the requirement of corroboration; the hearsay rule, particularly as reviewed by the Supreme Court of Canada; and the forms of evidence in family law legislation.

Provincial Family Law Statutes

Special funding was obtained from the Alberta Law Foundation to finance a project to rationalize and modernize provincial family law legislation. This requirement had been highlighted in several previous projects and the Board was of the view that it could not wait to accommodate this project in its normal inventory of activities. As a result, Professor Christine Davies was retained as a Special Counsel and was influential in preparing the initial materials. Professor Davies was unable to act as the Principal Researcher due to pressure of other activities. Professor Julien Payne of the University of Ottawa, who had previously worked on projects with the Institute, was retained as a Special Consultant on this project.

The project will be divided into three parts. The first, for which a Report for Discussion should issue in late 1991, relates to the removal of all of the outmoded provisions which are currently in the Domestic Relations Act. The balance of the work can be divided into two discrete segments, the first dealing with guardianship, custody and access, and the second dealing with maintenance and support, being subdivided into spousal support and child support.

The Board has approved the general direction for the project. It will be important to liaise closely with the Federal-Provincial Family Law Committee so as to ensure consistency with any recommendations which might be issued with respect to federal legislation dealing with divorce.

Project Feasibility Studies

During the year in question, the Board received recommendations on three areas from the Project Selection Committee. Those three areas in which project feasibilities had been prepared were: Cost of Credit Disclosure, Unfair Contract Terms and Public Inquiries. The first project has been described elsewhere in this report. The second topic involves several areas, including the question of exculpatory clauses, the question of remedies for unfair contracts and whether

there ought to be a statutory remedy in such cases. Further research will be necessary to clarify the issues which will be addressed in this project and to define the project further. Inquiries in the legal profession are currently being conducted to determine the breadth of the proposed project.

The topic of Public Inquiries, under the charge of Mr. W.H. Hurlburt, Q.C., will examine the current legislation relating to inquiries to determine if improvement can be made in the procedures of such inquiries. In particular the Issues Paper will examine the dichotomy between advisory and investigatory commissions, the independence of commissions, the protection of the rights of individuals and the conduct of inquiries. The report will not address the question of why inquiries are held but will address the possible improvements that can be made in the conduct of inquiries, on the assumption that such inquiries will continue to be held and appointed.

SIGNIFICANT ISSUES

Last year the Annual Report highlighted three issues of major concern to the Institute. These issues were: The implementation of Institute reports; the annual financing of Institute activities; and cooperation with other agencies.

The year under review marks significant advances in two of the three areas.

The Institute Board met with the Attorney General and his Deputy in September of 1989 to address the specific topic of implementation of Institute reports. A review of the statistics over twenty, ten and three year periods showed a drop in implementation of significant proportions. While explicable on the basis of the nature of Institute projects and the current government agenda, the matter was sufficient to cause concern and to be the topic of a specific meeting. The meeting was full, frank and positive in nature, discussing both ways in which appropriate projects might be chosen and ways in which the Institute's recommendations might find their way through the legislative process.

As a result of that meeting, the Attorney General, the Honourable Ken Rostad, took the initiative to make a significant step to allow Institute recommendations in specific areas to be the subject of review by the justice critics of all parties. This process allows the proposal and draft legislation to be vetted in advance by those critics and to be accorded a special priority in the Legislative Assembly. As a result of that process, two pieces of legislation were enacted in the Spring Session 1990 and three of the four pieces of legislation enacted in the 1991 Spring Session benefitted from the same process. This is a significant and progressive step which has no real precedent in other legislative assemblies. The Institute commends the Attorney General for this progressive action which has already borne fruit in the implementation of legislation such as the Enduring Powers of Attorney Act and the Arbitration Act. The initiative could not have been brought to fruition without the cooperation and constructive input of the justice critics for the opposition parties. The Institute acknowledges its gratitude to those critics.

In the area of cooperative relationships with other agencies there has been significant gain both within the Province and nationally. The Institute has assisted in the foundation of the Federation of Law Reform Agencies of

Canada which it hopes will play an active role in advancing the cause of law reform generally and creating linkages between all levels of the law reform agencies. Already, the annual law reform staff workshop has proved useful. In August of 1990, the Institute Director, Professor Peter J.M. Lown, was elected the Chairman of the Uniform Law Section of the Uniform Law Conference of Canada and therefore has carriage of and influence over the agenda of that body.

Within the Province the Institute has embarked on three difference cooperative projects. The Surrogate Rules project and Surrogate Forms project are joint projects with the Surrogate Rules Committee, a Committee appointed by the Attorney General to review from time to time matters of concern relating to the Surrogate Rules. In conjunction with the Civil Practice Advisory Committee, a Committee of the Law Society of Alberta, the Institute has begun to examine matters of civil procedure and administration of justice with a view to effecting beneficial changes in the area of civil litigation. Finally, the Institute has continued its cooperation with the Canadian Research Institute for Law and the Family, located at the Faculty of Law at the University of Calgary. On this occasion, the two bodies have collaborated on a project relating to access and enforcement of access. During this study, a questionnaire has been developed which will be administered to a randomly selected group, and on the basis of a pilot study the two Institutes hope to generate reliable and meaningful information relating to the question of access by non-custodial parents and other family members.

Cooperative projects always involve slight adjustments and changes in the way in which the Institute carries out its work. On the other hand, the broader consultation and advice which is received by such projects outweighs the added complexities.

Finance remains a significant concern to the Institute. Notwithstanding frugal management of resources by the Institute internally, the Institute is dependent upon the annual decision of its founding parties to supply funding according to the terms of the five year agreement. It is to be expected that there might be small fluctuations in the level of funding and that the other parties might compensate accordingly. This happened in 1990 when the contribution of the Province through the Attorney General's Department was significantly less than the forty percent of the annual budget which is called for by the agreement. Fortunately, during that year the Law Foundation was

able to provide some additional funds which avoided the Institute suffering a deficit. The continuation of funding at the same level as last year by the Attorney General will put significant pressure on the Institute's budget for the 1991-92 financial year and it is unlikely that the Alberta Law Foundation will be able to provide any additional funds. The necessity to avoid the vagaries of annual fluctuations in funding and the ability to plan for longer term projects makes the question of longer term financing for the Institute even more crucial than it has been in the past. This will become a matter of Board activity during the 1991-92 year.

PUBLICATIONS AND PRESENTATIONS

Institute Counsel carry a fairly heavy responsibility for making presentations to various interest groups on projects under their charge. It is quite common for presentations to be made to interest groups, to service groups and to the appropriate sections of the Canadian Bar Association. Similarly, a brief synopsis and summary may be prepared for inclusion in a number of newsletters distributed both to the legal profession and more widely.

In addition to this activity the following counsel have prepared formal publications presented either in the publications noted or at the conferences noted after each entry.

C. Gauk

Book Review: "*Law Reform Commissions in the United Kingdom, Australia and Canada*" by W.H. Hurlburt. (Edmonton, Juriliber, 1986) [1990] 28 Alta. Law Review, 693.

Forthcoming: Comment on *Albrecht v. Albrecht*, Decision of the Ontario Divisional Court, October 1990 in (1991) 31 R.F.L. (3d) at 325.

W.H. Hurlburt

"Renovating the Foundations: A Revision of the Land Titles Act", A paper presented to the seminar "Polaris and Beyond" on June 4, 1990, Canadian Bar Association (Ontario).

W.H. Hurlburt was drafter and counsel for the Review Panel, entitled "Report on Conflicts of Interests Rules for Cabinet Ministers, Members of the Legislative Assembly and Senior Public Servants". The Review Panel was composed of Chief Judge E.R. Wachowich, Chairman, and Dr. Walter Buck and Frank King, and delivered its report in 1990. (The *Conflicts of Interest Act* was enacted at the Spring Session of the Legislature - S.A. 1991, c. C-22.1.)

P.J.M. Lown

P. Lown, M.L. McCall and J.P. Hornick, "Alberta Law and the Family", A study paper prepared for The Lieutenant-Governor's Conference - Celebrating Alberta's Families, Edmonton, Alberta, February 19-21, 1990.

"Reform of the Law of Trade Secrets", Proceedings of the Pacific Northwest Intellectual Property Forum, February 8-10, 1991, Victoria, B.C.

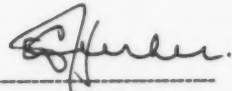
M.A. Shone

"Health, Poverty and the Elderly: Can the Courts Make a Difference?", Paper presented at the Canadian Institute for the Administration of Justice Conference on Health Care, Ethics and Law (Toronto, 10-13 October 1990). Publication pending in the Conference Proceedings and in (1991), 29 Alta. L. Rev.

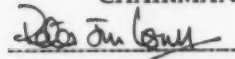
"Parenting Children with Mental Disorder: Whose Responsibility Is It?" Paper presented at the VIIth World Conference of the International Society on Family Law (Opatiya, Yugoslavia, 13-18 May 1991). Paper not ready for publication as of yet.

E.E. DAIS
J.L. FOSTER
A.D. HUNTER
H.J.L. IRWIN
P.J.M. LOWN
B.L. RAWLINS
C.G. WATKINS

C.W. DALTON
A. FRUMAN
W.H. HURLBURT
D.P. JONES
J.P. MEEKISON
A.C.L. SIMS



CHAIRMAN



DIRECTOR

March 1991

APPENDIX A

LIST OF BOARD MEMBERS

Present Members

M.B. Bielby, Q.C.

Member at large - June 1986 to April 1990

E.E. Dais

University of Calgary Faculty of Law nominee - November 1988 to March 1991

C.W. Dalton

Attorney General's nominee - March 1984 to August 1989

Attorney General's nominee - June 1990 to present

J.L. Foster, Q.C.

Member at large - April 1987 to present

A. Fruman

Member at large - May 1990 to present

Alan D. Hunter, Q.C.

Law Society nominee - October 1988 to present

Chairman - March 1989 to present

W.H. Hurlburt, Q.C.

Law Society nominee - November 1967 to January 1970

Member at large - February 1970 to January 1971

Law Society nominee and Chairman - February 1971 to December 1973

Member at large and Associate Director - January 1974 to August 1975

Director - September 1975 to March 31, 1986

Attorney General's nominee - October 1986 to present

H.J.L. Irwin

Member at large - June 1986 to present

D.P. Jones, Q.C.

University of Alberta Faculty of Law nominee - October 1986 to April 1990

Member at large - May 1990 to present

P.J.M. Lown

University of Alberta Faculty of Law nominee - January 1983 to February 1983

Director - April 1988 to present

J.P. Meekison

University of Alberta nominee (Vice-President (Academic)) August 1985 to present

Hon. Madam Justice B.L. Rawlins

Member at large - June 1986 to present

A.C.L. Sims

Member at large - June 1986 to present

C.G. Watkins

Member at large - March 1986 to present

Former Members

G.W. Acorn, Q.C.

Attorney General's nominee - November 1967 to January 1969

D. Trevor Anderson

University of Alberta Faculty of Law nominee - November 1967 to June 1971

J.W. Beames, Q.C. (deceased)

Member at large - August 1979 to March 1986

Law Society nominee and Chairman - March 1986 to July 1988

W.F. Bowker, Q.C., Director Emeritus

Director - January 1968 to August 1975

Member at large - September 1975 to December 1984

Her Honour, Judge Margaret Donnelly

Attorney General's nominee - June 1976 to February 1979

C.R.B. Dunlop

University of Alberta Faculty of Law nominee - September 1981 to
December 1982

G.C. Field, Q.C.

Member at large - April 1981 to May 1986

H.G. Field, Q.C.

Law Society nominee and Chairman - November 1967 to February 1971

R.P. Fraser, Q.C.

Member at large - June 1970 to January 1976

Law Society nominee - January 1976 to February 1979

Dean G.H.L. Fridman

Member at large (University of Alberta Faculty of Law) - February 1971
to June 1975

S.A. Friedman, Q.C.

Attorney General's nominee - November 1967 to November 1970

E.J.F. Gamache, Q.C. (deceased)

Attorney General's nominee - February 1979 to February 1984

R.G. Hammond

Member at large - March 1985 to March 1986

Director - April 1986 to March 1988

J.E. Hart, Q.C. (deceased)

Attorney General's nominee - November 1967 to January 1969

Wm. Henkel, Q.C.

Attorney General's nominee - December 1970 to June 1976

R.G. Hopp

University of Alberta Faculty of Law nominee - August 1979 to
September 1981

Dr. M. Horowitz

University of Alberta nominee (Vice-President (Academic)) - July 1975 to
July 1979

Constance D. Hunt

Member at large (University of Calgary Faculty of Law) - July 1980 to
June 1981

Dr. Henry Kreisel (deceased)

University of Alberta nominee - (Vice-President (Academic)) -
September 1970 to June 1975

F.A. Laux

University of Alberta Faculty of Law nominee - September 1972 to May
1976

L.C. Leitch

University of Alberta nominee (Vice-President (Finance and
Administration)) - February 1980 to August 1985

J.C. Levy

University of Calgary Faculty of Law nominee - December 1981 to
October 1988

Dr. A.G. McCalla (deceased)

University of Alberta nominee (Vice-President (Academic)) - November
1969 to May 1970

Dean J.P.S. McLaren

Member at large (University of Calgary Faculty of Law) - January 1976
to June 1980

T.W. Mapp

Member at large - April 1981 to May 1986

Hon. Mr. Justice D.B. Mason

Member at large - February 1979 to September 1985, and March 1986 to March 1989

Robert R. Neve (deceased)

Member at large - April 1970 to May 1970

R.S. Nozick

University of Alberta Faculty of Law nominee - March 1983 to May 1986

J.S. Palmer

Law Society nominee - November 1967 to February 1970

R.M. Paton (deceased)

Attorney General's nominee - May 1982 to June 1985

Julien D. Payne

University of Alberta Faculty of Law nominee - July 1971 to June 1972

Madam Justice Ellen Picard

Member at large - June 1975 to December 1975

University of Alberta Faculty of Law nominee - May 1976 to July 1979

Margaret A. Shone

Member at large - May 1985 to May 1986

Justice W.A. Stevenson

University of Alberta Faculty of Law nominee - August 1969 to January 1970

Member at large - February 1970 to December 1973

Law Society nominee and Chairman - January 1974 to January 1976

Member at large and Chairman - January 1976 to July 1979

Dr. A.R. Thompson

University of Alberta Faculty of Law nominee - November 1967 to June 1969

Justice W.E. Wilson, Q.C.

Law Society nominee - June 1976 to March 1986

Chairman - September 1979 to March 1986

H.W. Wineberg

Attorney General's nominee - September 1989 to May 1990

Dr. Max Wyman

University of Alberta nominee (Vice-President (Academic)) - November
1967 to March 1969

APPENDIX B

RECORD OF LEGISLATION BASED ON INSTITUTE'S RECOMMENDATIONS

<u>Formal Report - Number and Title</u>	<u>Legislation</u>
No. 1 Compensation for Victims of Crime (1968)	Criminal Injuries Compensation Act, R.S.A. 1970, c. 75 (now R.S.A. 1980, c. C-33, am. by S.A. 1982, c. 14)
No. 2 Powers of Personal Representatives to Grant Options (June 1969)	Wills Act, R.S.A. 1970, c. 393, s. 30 (now R.S.A. 1980, c. W-11, s. 30) Devolution of Real Property Act, R.S.A. 1970, c. 109, s. 13 (now R.S.A. 1980, c. D-34, s. 12)
No. 3 Occupiers' Liability (December 1969)	Occupiers' Liability Act, S.A. 1973, c. 79 (now R.S.A. 1980, c. O-3)
No. 4 Age of Majority (January 1970)	Age of Majority Act, S.A. 1971, c. 1 (now R.S.A. 1980, c. A-4)
No. 5 Guarantees Acknowledgment Act, R.S.A. 1970, c. 173 (October 1970)	Principal recommendation for retention of Guarantees Acknowledgment Act (now R.S.A. 1980, c. G-12) accepted. Recommendations for incidental amendments not acted upon.
No. 6 Rule Against Perpetuities (August 1971)	Perpetuities Act, S.A. 1972, c. 131 (now R.S.A. 1980, c. P-4)

No. 7	Joinder of Divorce Proceedings with other Causes of Action (August 1971)	Alberta Rules of Court, Rule 563(3), Alta. Reg. 315/71
No. 8	Assignment of Wages (October 1971)	Wage Assignments Act, S.A. 1972, c. 61 (now R.S.A. 1980, c. W-1)
No. 9	Rule in <i>Saunders v. Vautier</i> (February 1972)	S.A. 1973, c. 13, s. 12 amending the Trustee Act, R.S.A. 1970, c. 373, s. 37 (now R.S.A. 1980, c. T-10, s. 42)
No. 10	Powers of Maintenance and Advancement (June 1972)	S.A. 1974, c. 65, s. 9 amending the Trustee Act, R.S.A. 1970, c. 373, ss. 31-33 (now R.S.A. 1980, c. T-10, ss. 32, 34, 35, 36(3), 37)
No. 11	Common Promisor and Promisee: Conveyances with a Common Party (October 1972)	Common Parties Contracts and Conveyances Act, S.A. 1974, c. 20 amended 1975, c. 5 (2 sess.) (now Law of Property Act, R.S.A. 1980, c. L-8, ss. 10-13; Land Titles Act, R.S.A. 1980, c. L-5, ss. 71, 72, 119)
No. 12	Expropriation (March 1973)	Expropriation Act, S.A. 1974, c. 27 (now R.S.A. 1980, c. E-16)
No. 13	Judicature Act, Section 24 (August 1974)	S.A. 1974, c. 65, s. 9 striking out s. 24 of the Judicature Act, R.S.A. 1970, c. 193
No. 14	Minors' Contracts (January 1975)	
No. 15	Validity of Rules of Court (December 1974)	S.A. 1976, c. 58, s. 6(4) amending the Judicature Act, R.S.A. 1970, c. 193, s. 39 (now R.S.A. 1980, c. J-1, s. 47)

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| No. 16 | <i>Rule in Hollington v. Hawthorn</i> (February 1975) | S.A. 1976, c. 57, s. 1 amending the Alberta Evidence Act, R.S.A. 1970, c. 127, s. 27 (now R.S.A. 1980, c. A-21, s. 27) |
| No. 17 | Small Projects (June 1975) | S.A. 1976, c. 55, s. 2 amending the Workers' Compensation Act, S.A. 1973, c. 87, s. 15 (now R.S.A. 1980, c. W-15, s. 15);
S.A. 1976, c. 58, s. 3 amending the Bulk Sales Act, R.S.A. 1970, c. 37 (now R.S.A. 1980, c. B-13, ss. 1(f), (j), 4(2), 6(b), 7, 14) |
| No. 18 | Matrimonial Property (August 1975) | Matrimonial Property Act, S.A. 1978, c. 22 (now R.S.A. 1980, c. M-9), enacting a combination of the majority and minority proposals for the distribution of matrimonial property, and an extension of the recommendations on possession of the matrimonial home |
| No. 19 | Consent of Minors to Health Care (December 1975) | |
| No. 20 | Status of Children (June 1976) | Substantially enacted, pursuant to the recommendations in Report No. 60 by the Family and Domestic Relations Statutes Amendment Act, 1991, S.A. 1991, c. 11. |
| No. 21 | Purchase by a Company of Shares Which It Has Issued (January 1977) | S.A. 1977, c. 13, s. 2 amending the Companies Act, R.S.A. 1970, c. 60, s. 41 (reenacted as R.S.A. 1980, c. C-20, ss. 42-49, 51-54, then superseded by S.A. 1981, c. B-15, ss. 32 and 33: see Report No. 36) |

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| No. 22 | Residential Tenancies
(February 1977) | Landlord and Tenant Act, 1979, S.A. 1979, c. 17 (now R.S.A. 1980, c. L-6), based in large part on our recommendations |
| No. 23 | Partition and Sale (March 1977) | Partition and Sale Act, S.A. 1979, c. 59 (now Law of Property Act, R.S.A. 1980, c. L-8, ss. 14-19, 20-34) |
| No. 24 | Survival of Actions and Fatal Accidents Act Amendment (April 1977) | Survival of Actions Act, S.A. 1978, c. 35 (now R.S.A. 1980, c. S-30; Fatal Accidents Act R.S.A. 1980, c. F-5, ss. 5(2)(a), (b), 8; and Limitation of Actions Act, R.S.A. 1980, c. L-5, s. 53) |
| No. 25 | Family Law Administration: the Unified Family Court (April 1978) | |
| No. 26 | Family Law Administration: Court Services (April 1978) | Some recommendations carried out by administrative action. |

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| No. 27 | Matrimonial Support
(March 1978) | <p>S.A. 1977, c. 64 amending Part 4 of the Domestic Relations Act, R.S.A. 1970, c. 113 (now covered by the Maintenance Enforcement Act, S.A. 1985, c. M-0.5, establishing a collection service for support orders which is generally consistent with though different in detail from our recommendations, and providing improved collection procedures which are similar to but in several particulars more stringent than our proposals);</p> <p>S.A. 1977, c. 92 amending the Social Development Act, R.S.A. 1970, c. 345 (now R.S.A. 1980, c. S-16, ss. 14, 15); S.A. 1978, c. 49, s. 2 amending the Debtors' Assistance Act, R.S.A. 1970, c. 86 (now R.S.A. 1980, c. D-5, ss. 3(2), 3(3), 4(e)-(f), (6)</p> <p>(Our proposals for change in the substantive law have not yet been implemented.)</p> |
| No. 28 | Tenancies of Mobile
Home Sites (April 1978) | <p>Mobile Home Sites Tenancies Act,
S.A. 1982, c. M-18.5</p> |
| No. 29 | Family Relief (June 1978) | |
| No. 30 | The Builders' Lien Act:
Certain Specific Problems
(March 1979) | <p>S.A. 1985, c. 14 amending the
Builders' Lien Act, R.S.A. 1980, c. B-
12</p> |
| No. 31 | Contributory Negligence
and Concurrent
Wrongdoers (April 1979) | |

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| No. 32 | Guest Passenger
legislation (April 1979) | Proclamation 5 July 1979 of
previously enacted S.A. 1977, c. 76,
s. 6 to come into force 1 September
1979 (now Insurance Act, R.S.A.
1980, c. I-5, s. 310) (This is not the
principal recommendation of the
Report.)
Gratuitous Passengers and
Interspousal Tort Immunity Statutes
Amendment Act (S.A. 1990 C. 22, s.
1). |
| No. 33 | Inter-Spousal Tort
Immunity (April 1979) | Gratuitous Passengers and
Interspousal Tort Immunity Statutes
Amendment Act (S.A. 1990 C. 22,
ss. 2 and 3). |
| No. 34 | Service of Documents
During Postal
Interruptions (June 1979) | S.A. 1980, c. 88 (now Judicature Act,
R.S.A. 1980, c. J-1, ss. 33-37) |
| No. 35 | Defamation: Fair
Comment and Letters to
the Editor (October 1979) | S.A. 1980, c. 11 amending the
Defamation Act, R.S.A. 1970, c. 87
(now R.S.A. 1980, c. D-6, s. 9) |
| No. 36 | Proposals for a New
Alberta Business
Corporations Act (August
1980), 2 vols. | Business Corporations Act, S.A.
1981, c. B-15 |
| No. 37A | The Uniform Evidence
Act 1981: A Basis for
Uniform Evidence
Legislation (June 1982) | |
| No. 37B | Evidence and Related
Subjects: Specific
Proposals for Alberta
Legislation (June 1982) | |

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|--------|--|--|
| No. 38 | The Uniform Sale of Goods Act (October 1982) | |
| No. 39 | Defences to Provincial Charges (March 1984) | |
| No. 40 | Judicial Review of Administrative Action: Application for Judicial Review (March 1984) | Court of Queen's Bench Amendment Act, 1987, S.A. 1987, c. 17 |
| No. 41 | Compensation for Security Interests in Expropriated Land (May 1984) | |
| No. 42 | Debt Collection Practices (June 1984) | |
| No. 43 | Protection of Children's Interests in Custody Disputes (October 1984) | |
| No. 44 | Statute of Frauds (June 1985) | |
| No. 45 | Status of Children: Revised Report, 1985 (November 1985) | Substantially enacted, pursuant to the recommendations in Report No. 60 by the Family and Domestic Relations Statutes Amendment Act, 1991, S.A. 1991, c. 11. |
| No. 46 | Trade Secrets (July 1986) | Draft statute adopted by Uniform Law Conference of Canada, Victoria, B.C., August 1987 |
| No. 47 | Survivorship (August 1986) | |

- No. 48 Matrimonial Property:
 Division of Pension
 Benefits Upon Marriage
 Breakdown (June 1986)
- No. 49 Proposals for a New Bill 54 (Volunteer Incorporations
 Alberta Incorporated Act) introduced into Alberta
 Associations Act (March Legislature, June 15, 1987
 1987)
- No. 50 Prejudgment Remedies
 for Unsecured Claimants
 (February 1988)
- No. 51 Proposals for a New Arbitration Act, S.A. 1991, c. A-43.1.
 Alberta Arbitration Act
 (October 1988)
- No. 52 Competence and Human
 Reproduction (February
 1989)
- No. 53 Towards Reform of the
 Law Relating to
 Cohabitation Outside
 Marriage (June 1989)
- No. 54 Financial Assistance by a
 Corporation: Section 42,
 The Business
 Corporations Act
 (Alberta) (August 1989)
- No. 55 Limitations (December
 1989)
- No. 56 The Bulk Sales Act
 (January 1990)

No. 57	Section 16 of the Matrimonial Property Act (March 1990)	Miscellaneous Statutes Amendment Act, 1991, S.A. 1991, c. 21, s. 24.
No. 58	Division of Canada Pension Plan Credits in Alberta (November 1990)	
No. 59	Enduring Powers of Attorney (December 1990)	Powers of Attorney Act, S.A. 1991 c. P-13.5.
No. 60	Status of Children: Revised Report, 1991 (March 1991)	Family and Domestic Relations Statutes Amendment Act, 1991, S.A. 1991, c. 11.
No. 61	Enforcement of Money Judgements (March 1991)	

The principal recommendation of
Research Paper No. 18 was
implemented by Alta. Reg. 308/91

APPENDIX C

OTHER PUBLICATIONS

Annual Reports

Five Year Report 1968-1973

Annual Reports 1973-1974 to 1989-1990 inclusive

Reports for Discussion

- | | |
|-------|---|
| No. 1 | Protection of Trade Secrets (February 1984) |
| No. 2 | Matrimonial Property: Division of Pension Benefits upon
Marriage Breakdown (May 1985) |
| No. 3 | Remedies of Unsecured Creditors (May 1986) |
| No. 4 | Limitations (September 1986) |
| No. 5 | Financial Assistance by a Corporation: Section 42, The
Business Corporations Act (Alberta) (August 1987) |
| No. 6 | Sterilization Decisions: Minors and Mentally Incompetent
Adults (March 1988) |
| No. 7 | Enduring Powers of Attorney (February 1990) |
| No. 8 | Towards a New Alberta Land Titles Act (August 1990) |

Issues Papers

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| No. 1 | Towards a New Arbitration Act for Alberta (July 1987) |
| No. 2 | Towards Reform of the Law Relating to Cohabitation Outside
Marriage (October 1987) |

Research Papers

- No. 1 Rent Control; Security of Tenures (November 1975)
- No. 2 Entry of Landlord; Locks and Security Devices (November 1975)
- No. 3 Obligation to Repair; Security Deposits (November 1975)
- No. 4 Termination Procedures; Failure of Tenants to Pay Rent; Overholding Tenants (November 1975)
- No. 6 Resolution of Disputes; Landlord and Tenant (Advisory Boards; Distress (November 1975)
- No. 7 Contract or Property Law; Form and Delivery of Lease; Right to Assign or Sublet (November 1975)
- No. 8 Mobile Homes (November 1975)
- No. 9 Consent of Minors to Medical Treatment (May 1975)
- No. 10 Illegitimacy (June 1974)
- No. 11 Administration of Family Law: The Unified Family Court: Constitutional Opinions (May 1978)
- No. 12 Statute of Frauds (May 1979)
- No. 13 Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved (Canadian Institute for Research in the Behavioral and Social Sciences: May 1981)
- No. 14 Conference Materials, International Invitational Conference on Matrimonial and Child Support, 27-30 May 1981 (October 1982)
- No. 15 Survey of Adult Living Arrangements: A Technical Report (November 1984)
- No. 16 The Operation of the Unsecured Creditors' Remedies System in Alberta (March 1986)
- No. 17 Corporate Directors' Liability (February 1989)
- No. 18 Report on Referees (February 1990)
- No. 19 Dispute Resolution: A Directory of Methods, Projects and Resources (July 1990)

Books

Sir Victor Windeyer, *Some Aspects of Australian Constitutional Law* (1972)

Thomas W. Mapp, *Torrens' Elusive Title: Basic Legal Principles of an Efficient Torrens' System* (1978) (Alta. L.R. Book Series, v. 1)

The Alberta Limitations Manual, Butterworths & Co. (Western Canada) Ltd., 1979. (Although not prepared by the Institute, the Manual was based upon a list of statutory limitation periods in Alberta originally prepared by members of the Institute's legal staff.)

Olive M. Stone, *The Child's Voice in the Court of Law*, Butterworth & Co. (Canada) Ltd., 1982. (Dr. Stone's book is based on work done for the Institute while she was employed full-time as consultant on our Family Law Project).

W.H. Hurlburt, *Law Reform Commissions in the United Kingdom, Australia and Canada*. Juriliber Limited, 1986.